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NOS. 1116 & 1117

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

JAMES C. KIRKPATRICK, Secretary of State of Missouri, and NORMAN H. ANDERSON, Attorney General of Missouri,

Appellants,

and

F. V. HEINKEL, R. J. ROSIER, W. W. BECKETT, A. D. SAPPINGTON, L. O. WALLIS, MILLER HERN, HERMAN HETLAGE, HERMAN KERTZ, TURPIN YOUTSEY and GLEN MYERS,

Intervenor-Appellants,

vs.

PAUL W. PREISLER, LOUISE ERBE, BOSTIC J. FRANKLIN, LUCILE RIEDEL, DOROTHY CHILDS, SARAH RIFKIN, and MARTHA LEONARD,

Appellees.

**On Appeal from the United States District Court For the Western District of Missouri Central Division.**

## APPELLANTS' BRIEF ON THE MERITS.

### PRELIMINARY STATEMENT.

This is an appeal from the opinion, judgment and decree of the United States District Court for the Western District of Missouri, Central Division, entered on December 29, 1967, decreeing that the 1967 Missouri Congressional Redistricting Act is unconstitutional and void. A three-judge court

was convened to hear this cause and the judgment appealed from was concurred in by two members of the court, viz., the Honorable John W. Oliver, and the Honorable William R. Collinson, Judges of the United States District Court for the Western District of Missouri. The third member of the Court, the Honorable M. C. Matthes, Judge of the United States Court of Appeals for the Eighth Circuit, dissented from this judgment.

## OPINION BELOW.

The judgment of the court and the opinion appealed from is reported at 279 F.Supp. 952. The opinion is on file in this court in a printed document entitled Appendices to Jurisdictional Statement. The footnotes are printed in a separate accompanying document. These documents accompanied the Jurisdictional Statement filed by appellants.

The judgment and opinion appealed from are sequels to Preisler v. Secretary of State of Missouri, W.D.Mo. 1965, 238 F.Supp. 187, decided January 4, 1965, and Preisler v. Secretary of State of Missouri, W.D.Mo. 1966, 257 F.Supp. 953, decided August 5, 1966, affirmed sub nom. Kirkpatrick v. Preisler, 385 U.S. 450.

## JURISDICTION.

This suit involves the constitutionality of a State statute under Article I, Section 2, of the Constitution of the United States, and was required to be adjudicated by a three-judge court under Sections 2281 and 2284 of Title 28, United States Code. Section 2101 of Title 28, United States Code, requires the Notice of Appeal to be filed within 60 days after the entry of final judgment. The judgment of the District Court, which was entered on December 29, 1967, declared the State statute to be unconstitutional, declared filings for the House of Representatives of the United States Congress pursuant to said statute to be null and void and prohibited appellants from accepting further filings under the statute.

Notice of Appeal was filed in the lower court on January 12, 1968. Rule 13 of this court requires that a Jurisdictional Statement be filed and the case docketed within 60 days from the filing of the Notice of Appeal. The Jurisdictional Statement was filed and the case docketed on February 14, 1968. Probable jurisdiction was noted by this court on March 4, 1968. This brief is filed pursuant to an extension of time by the clerk to May 15, 1968, for filing of appellant's brief. The jurisdiction of the Supreme Court to review this decision by direct appeal in this case is sustained by Wesberry v. Sanders, 374 U.S. 802.

## STATUTE INVOLVED.

The judgment and decree appealed from found that the 1967 Missouri Congressional Redistricting Act, Sections 128.203 to 128.302, inclusive, Missouri Revised Statutes, Cumulative Supplement 1967, pages 374 and 375, does not comply with Article I, Section 2, of the Constitution of the United States, and is therefore, unconstitutional and void. The 1967 Missouri Congressional Redistricting Act is set forth in Appendices to Jurisdictional Statement as Appendix F.

## QUESTIONS PRESENTED.

### I.

The opinion, decision and judgment appealed from erroneously found that the 1967 Missouri Congressional Redistricting Act, House Substitute for Senate Committee Substitute for Senate Bill No. 182, 74th General Assembly of the State of Missouri, does not comply with Article I, Section 2, Constitution of the United States, and is unconstitutional and void. Population was the principal factor considered by the legislature in enacting this law, and the minor variations in the populations of the resulting congressional districts fully comply with the constitutional requirement that as nearly as is practicable one man's vote in

a congressional election is to be worth as much as another's. The 1967 Missouri Congressional Redistricting Act complies with Article I, Section 2, Constitution of the United States, is in harmony with all applicable constitutional principles and is valid.

2.

The opinion, decision and judgment appealed from erroneously construed Article I, Section 2, Constitution of the United States, and Wesberry v. Sanders, 376 U.S. 1 (1964), by finding that congressional districts are not as equal in population as practicable if any other plan proposed to the legislature or to the court can result in districts with smaller population variations.

3.

The opinion, decision and judgment appealed from erroneously construed Article I, Section 2, Constitution of the United States, and prior decisions of this court by holding that population variations between congressional districts which are de minimis are constitutionally impermissible; and by holding that minor variations in the population of congressional districts are constitutionally impermissible in the absence of competent and substantial evidence justifying the variations.

4.

The opinion, decision and judgment appealed from is erroneous and in conflict with prior decisions of this court in holding that in establishing congressional districts no allowance can be made for legislative interplay and that any population deviations from absolute mathematical equality between congressional districts attributable to political compromise within the state legislature is arbitrary and discriminatory and invalidates such legislation. The opinion renders nugatory considerations other than population which

may be recognized by the legislature in drawing congressional districts as provided by prior decisions of this court.

5.

The opinion, decision and judgment appealed from is based upon conclusions which result from a multitude of inaccuracies, irrelevancies and distortions in the findings of fact. For example: the court erroneously found that the Missouri Legislature at no time considered accurate 1960 census figures; the court erroneously found that "better plans were in fact presented to but rejected by Missouri legislators"; the court distorted the testimony of legislative leaders; the court relied upon post-hearing information from unknown sources to discredit appellants' evidence in regard to areas of the state with growing population; the court erroneously assumes that rural voters and urban voters must be segregated in congressional districting; and many more.

## STATEMENT OF THE CASE.

### 1.

### BACKGROUND

As a result of the United States Census of 1960, the number of members to which the State of Missouri was entitled in the House of Representatives in the United States Congress was reduced from 11 to 10. In 1961 the Legislature of the State of Missouri by law divided the state into ten congressional districts for the election of members to the House of Representatives. Following this court's decision in **Wesberry v. Sanders**, 376 U.S. 1 (1964), the constitutionality of the 1961 Missouri Congressional Redistricting Act became the subject of a civil suit in the United States District Court for the Western District of Missouri. If districts which were absolutely equal in population were established, each district would contain one-tenth of the population of the state or 431,981.3 people. Under the 1961 Act the largest

district had a population of 506,854 or a population of 74,873 in excess of a mathematically ideal district. The smallest district had a population of 378,499 or a population of 53,482 less than a mathematically ideal district. The largest district had a population of 128,355 in excess of the population of the smallest district. In a decision rendered on January 4, 1965, the court found that the 1961 Act did not meet the requirements of Article I, Section 2, of the Constitution and was void. **Preisler, et al. v. Secretary of State of Missouri, et al.**, 238 F.Supp. 187,

In 1965 the Legislature of the State of Missouri enacted a new congressional redistricting law. Under the 1965 Congressional Redistricting Act the population of the largest district was 474,985 or 42,914 persons in excess of a mathematically ideal district. The population of the smallest district was 390,240 or 41,741 persons less than a mathematically ideal district. The largest district had a population of 84,655 in excess of the population of the smallest district. The constitutionality of the 1961 Act became the subject of a civil suit in the United States District Court for the Western District of Missouri in **Preisler, et al. v. The Secretary of State of Missouri, et al.**, 257 F.Supp. 953. The court found that the 1965 Act did not meet the requirements of Article I, Section 2, of the Constitution and was therefore void. Upon appeal to this court the judgment of the lower court was affirmed in **Kirkpatrick v. Preisler**, 385 U.S. 450.

In **Preisler v. Secretary of State**, 257 F.Supp. 953, the court retained jurisdiction for the purpose of the court's future consideration of the constitutionality of any subsequent legislation relating to congressional redistricting that might in the future become the law of Missouri. Upon the 1967 Congressional Redistricting Act becoming law, appellants filed a motion with the court seeking approval of the 1967 Act and seeking termination of the proceedings.

After hearings held on the motion and after consideration of briefs filed, the court, by a two to one decision, held that the 1967 Act does not comply with the requirements of Article I, Section 2, Constitution of the United States, and is void. This appeal is taken from that decision.

## 2.
## THE 1967 ACT.

In 1967 the 74th General Assembly of the State of Missouri once again engaged in the task of drawing ten congressional districts for the state. At least sixteen different congressional redistricting plans were considered by the legislature. The first Bill was introduced on January 18, 1967. After considering the many plans before it, legislative deliberation had resolved itself down to two plans, and a Bill was enacted on June 27, 1967 (Stip. Ex. 11, p. 17). The final enactment came after a deadlock had been broken between the two Houses of the Legislature upon the submission of a House substitute for the Senate Bill by the Majority Leader of the House of Representatives.

The 1960 United States census population figures were the starting point for the General Assembly in its legislative deliberations concerning congressional redistricting. The author of the Bill had been Chairman of the Senate Committee on Reapportionment for a number of years. After the census was reported in 1961 Senator Avery personally prepared a map of the State of Missouri by counties in which he inserted the population of each county from the 1960 federal census (A. 118). He testified that this map was the basic tool for him in drafting the Bill which, after substantial amendment, was finally enacted (A. 119, Deposition Ex. A). He further testified that he appointed subcommittees to obtain accurate population figures for the current political subdivisions of the St. Louis and Kansas City urban areas (A. 111). Senator Young, a member of the sub-

committee from the St. Louis area, obtained from the Census Bureau the 1960 census data for political subdivisions in St. Louis City (A. 112, 121, Stip. Ex. 18). Ward populations based on the 1960 census were furnished to the committee by the Board of Election Commissioners of the City of St. Louis (A. 112). Senator Young also furnished to the committee data prepared by the Census Bureau reflecting the population for townships in St. Louis County (A. 112 & 123, Stip. Ex. 23). Other evidence in the record reflecting the use of census data for the St. Louis area by the General Assembly is as follows: Stip. Ex. 16—Map of St. Louis by ward and precinct boundaries, 1966, Board of Election Commissioners for the City of St. Louis, showing 1960 population for each ward; Stip. Ex. 20—Map of townships, St. Louis County, Missouri, St. Louis County Planning Commission, 1965, showing 1960 population for each township Deposition Exhibits B and D, A. 4, 113, 122, 123, 129. Senator Ryan furnished to the committee a map of Kansas City showing estimated 1960 populations for each current ward (A. 112). This map had been prepared by the Board of Election Commissioners of the City of Kansas City (A. 115-116 and Deposition Ex. C). Further evidence of the use of 1960 census data in the Kansas City area by the General Assembly is Ex. 27—Jackson County Street Map, Copyright—Gallup Map and Stationery Company, showing 1960 township populations. The 1960 census figures were adhered to constantly in the consideration of the many plans before the General Assembly up to and including the final enactment of the 1967 Act.

The accurate application of 1960 census figures to proposed districts in the metropolitan areas of Kansas City, St. Louis and St. Louis County involved a number of difficulties. Ward lines and precinct lines in the cities of Kansas City and St. Louis had been changed subsequent to the 1960

census (A. 75-76, 110). Annexations had been made to Kansas City subsequent to the 1960 census (Stip. Ex. 28). Township lines and precinct lines had been changed in the County of St. Louis subsequent to the 1960 census. Entire new townships had been created in St. Louis County increasing the total number of townships and the total number of precincts (Stip. Ex. 24, A. 48-49). Relating 1960 census data to the new ward, township and precinct boundaries in these areas was a task to which the occurrence of some errors was almost inevitable. Population data for the new Kansas City wards was submitted by the local election officials admittedly as estimated data (A. 115-116).

Supporters of the Bill which was finally enacted informed the members of the legislature that the populations of the various districts were as follows (Appendices to Jurisdictional Statement 3; 279 F.Supp. l.c. 956): (Appellants have added to the tabulation the population variations from an ideal district of 431,981, together with the per cent of such variation.)

| Congressional District | Population | Variation from Ideal | Per cent of Variation |
|---|---|---|---|
| 1 | 436,417 | + 4,436 | +1.06% |
| 2 | 442,302 | +10,321 | +2.39% |
| 3 | 431,507 | — 474 | —0.11% |
| 4 | 423,815 | — 8,166 | —1.89% |
| 5 | 430,412 | — 1,569 | —0.36% |
| 6 | 425,238 | — 6,743 | —1.56% |
| 7 | 436,769 | + 4,788 | +1.10% |
| 8 | 439,984 | + 8,003 | +1.85% |
| 9 | 428,223 | — 3,758 | —0.87% |
| 10 | 423,866 | — 8,115 | —1.88% |

According to these population figures the largest district (No. 2) has a population of 18,487 in excess of the smallest district (No. 4), with a resulting ratio of largest district to smallest district of 1.04.

After the commencement of this litigation, it was discovered that population totals for the districts were inaccurately calculated by the sponsors of the compromise Bill. Correct

population figures were obtained from the Bureau of Census with the agreement of all parties to the case. The correct population figures for these congressional districts and the variation is set out below (Appendices to Jurisdictional Statement 3; 279 F.Supp. l.c. 956).

| Congressional District | Population | Variation from Ideal | Per cent of Variation |
|---|---|---|---|
| 1 | 439,746 | + 7,765 | +1.79% |
| 2 | 436,448 | + 4,467 | +1.03% |
| 3 | 436,099 | + 4,118 | +0.95% |
| 4 | 419,721 | −12,260 | −2.83% |
| 5 | 431,178 | − 803 | −0.18% |
| 6 | 422,238 | − 9,743 | −2.25% |
| 7 | 436,769 | + 4,788 | +1.10% |
| 8 | 445,523 | +13,542 | +3.13% |
| 9 | 428,223 | − 3,758 | −0.86% |
| 10 | 423,868 | − 8,113 | −1.87% |

The largest district (No. 8) has a population of 25,802 in excess of the smallest district (No. 4) with a resulting ratio of largest district to smallest district of 1.06.

Thus, although the 1960 U.S. Census figures were the data which was employed in the consideration of congressional redistricting legislation by the Missouri Legislature, inaccurate last minute calculations caused the legislature to believe that the populations of the congressional districts in the enacted Bill varied from an ideal district by a slightly lesser number of people than is actually reflected by correct calculations based upon the 1960 census. The state total discrepancy was 1,280 below the correct figure (A. 16). The evidence demonstrates the likelihood of the error in calculations to have occurred during the preparation of the House Substitute for Senate Committee Substitute for Senate Bill No. 182 on the weekend prior to its enactment. The testimony of both the Majority and Minority Leaders in the House of Representatives of the General Assembly so indicates (A. 67 and 96).

The uncontradicted testimony before the court by the legislative leaders from both parties for both Houses was

that the legislative deliberations in considering congressional redistricting during the 1967 session had been based upon population (A. 72, 82, 92, 97, 116 & 125).

Senator Avery testified that equalizing the population of the various districts was the principal goal of his committee. The next consideration of the committee was to make the districts as compact and as regular as was feasible (A. 116). He referred specifically to the establishment of Districts 8 and 10 insofar as Dent County is concerned. The population of the districts could have been made more equal if Dent County had been placed in the 10th District rather than in the 8th District. However, Dent County was placed in the 8th District in order to make this district more compact. In doing so it was the committee's judgment that the principle of population equality had not been sacrificed (A. 117). In his words "* * * the consideration of regular lines was as important as that of population, where it was within reason and we felt that 2% one way or another was within reason" (A. 117, see also A. 125). The Majority Leader of the House who sponsored the substitute bill which was finally enacted testified that the legislature "* * * wanted the districts to be as compact as possible, not try and string them out across the State * * *" (A. 72). The Majority Leader of the Senate testified that recognition was given to the compactness of districts in the legislative consideration (A. 83). The Minority Leader of the Senate testified that consideration was given to compactness (A. 92). Senator Waters, the Majority Leader of the Senate testified that recognition was given by the legislature to historical factors reflected in establishing these congressional districts. He stated as follows:

> "* * * I can cite one for example, that Ray County in my district has always been in the Sixth District, or whatever district represented northwest Missouri. They

wanted to stay there. They were leaning on me to try to get them to stay there, and quite naturally I was aware and took cognizance of this historical factor in trying to keep them up there so long as we could come up with something which reached the standards of the population" (A. 83 and 84).

Recognition of the historical factor by the legislature is reflected by the testimony of the Majority Leader of the House, (A. 72) and by the Chairman of the Senate Reapportionment Committee (A. 116). The effort of the legislature to avoid splitting county lines is reflected in the testimony of the Majority Leader of the House as follows:

"* * * another thing I should interject here, another very important thing, I think; we tried not to break up rural county lines. We tried to keep the county line or the county out in the rural areas. We did split up St. Louis County, St. Louis City and Jackson County. I think those are the only areas. So we tried not to break up the county lines, and we tried to, if possible, stick to historical useage of these counties in districts; in other words, if a certain county had historically been in a district with other counties over the years, we tried to leave it in that county if possible, if it didn't throw the population off" (A. 72 and 73).

Similar testimony was given by the Chairman of the Senate Reapportionment Committee (A. 119) who also stressed the importance of keeping entire counties in the same congressional district in order to prevent the disruption of the election process (A. 119 and 120). The witnesses stated the problem as follows:

"Well, one reason would be that it would be disrupting to the election processes in the county. But the main reason was that we just felt it was not, that our popula-

tions could be divided within a range of a couple of degrees one way or the other, and the other, not disturb the counties and the people in the counties by being divided."

In the creation of two of the smallest districts (No. 4 and No. 6) consideration was given to the factor that areas in these districts were growing rapidly in population (A. 82 and A. 86).

In the creation of the largest district (No. 8) consideration was given to a large number of transitory, nonresident and hence nonvoting people located within the boundaries of the district (Fort Leonard Wood, a large U.S. Military Reservation, the University of Missouri at Columbia and Rolla, and the State Capitol at Jefferson City) (A. 75, 82, 83, 86, 87, 88, and 98).

All of the legislative witnesses discussed the practical legislative difficulties in reaching agreement on any congressional legislation. The lower House of the Missouri Legislature is composed of 163 members and the upper House is composed of 34 members (A. 117). Any piece of legislation requires the vote of 82 members in the lower House and 18 in the upper House. The difficulties inherent in the enactment of congressional redistricting legislation is demonstrated by the testimony of the Majority Leader of the House as follows:

"* * * in other words, I could have probably got these within two or three voters, maybe, if we used a computer or something like that, but this would never pass the Legislature. We are dealing with men, and these men represent people at home, and I think they have to follow these people's wishes, so we had to try to adopt a plan that could get 82 votes in the House and 18 votes in the Senate."

The problem was stated by the Chairman of the Senate Reapportionment Committee as follows:

> "I might say it's mighty easy to sit before the fireside and divide this state, and either one of us could do it very much better than this is done perhaps, but when you got 163 members of the House and 34 members of the Senate and everybody having equal privilege, right to consider a redistricting, it soon gets away from one man's thought about the state and how it should be districted" (A. 117).

All of the experienced legislative leaders from both parties testified that the act under review was a reasonable legislative compromise (A. 76, 77, 85, 93, 96, and 125).

Following the enactment of the 1967 Act Senator Young filed a constitutional objection to the signing of House Substitute for Senate Committee Substitute for Senate Bill No. 182 on the grounds that the Bill did not meet the requirements of Article III, Section 45, of the Missouri Constitution that congressional districts be ". . . as nearly equal in population as may be," and that the Bill did not comply with the decision of the United States District Court on August 5, 1966. It is noted that Senator Young had sponsored a Bill in the Senate which would have created districts ranging in population from 440,252 to 417,399 populations variations in excess of those in the enacted Bill (Stip. Ex. 1). A similar objection was filed in the House of Representatives by Representatives Meyer, Mulvaney, Schlef and Walsh. Excessive population in the 2nd district was claimed (Stip. Ex. 11, pp. 18-19; R. 59). It is noted that all four of these Representatives voted for the Bill which was enacted (Stip. Ex. 11, p. 13).

## 3.

## LEGISLATIVE HISTORY OF THE 1967 ACT.

On January 26, 1967, there was introduced in the 74th

General Assembly of Missouri, Senate Bill No. 182 by State Senator Omer Avery, such bill being entitled An Act Relating to Congressional Districts. The Bill was read for the first time on this date, and on January 30, 1967, it was read for the second time and referred to the Committee on Apportionment (Stip. Ex. 11, p. 1; R. 59). As introduced, Senate Bill No. 182 contained congressional districts with populations ranging from a high of 448,824 and a low of 423,-103 (Stip. Ex. 5; R. 59). On March 21, 1967, Senator Avery, the Chairman for the Committee on Apportionment, reported to the Senate that after consideration of Senate Bill No. 182 the committee had recommended that Senate Committee Substitute thereto do pass. This Senate Committee Substitute to Senate Bill No. 182 reflected congressional districts varying from a high population of 446,965 to a low population of 423,868 (Stip. Ex. 6; R. 59). On March 23, 1967, the Senate Committee Substitute was taken up for perfection on the Floor of the Senate, and Senator Avery offered Senate Amendment No. 1 thereto, which was read (Stip. Ex. 11, p. 2; R. 59). Thereafter, on April 4, 1967, Senate Bill No. 182, with Senate Committee Substitute for Senate Amendment No. 1, pending, was called from the informal calendar and was again taken up for perfection. A Senate Substitute Amendment for Senate Amendment No. 1, was offered by Senator Vanlandingham and was adopted by a vote of 20 Yeas, 12 Nays and 2 Absents. On the same date Senator Johnson offered his Senate Substitute for Senate Bill No. 182, with population variances of 440,371 and 426,603, but no vote thereon was then taken (Stip. Ex. 11, p. 3; R. 59). On April 5, 1967, Senate Bill No. 182, with Senate Committee Substitute and Senate Substitute pending, was called from the informal calendar and again taken up for perfection. At this time perfecting amendments to the Senate Substitute were offered by Senators Waters, Johnson, and Cox, and adopted and still another perfecting

amendment to the Senate Substitute offered by Senator Lee was defeated (Stip. Ex. 11, p. 5; R. 59). At a night session on April 5, 1967, a perfecting amendment to the Senate Substitute offered by Senator Johnson was defeated as was the Senate Substitute itself. The Senate Substitute for Senate Bill No. 182 as it was amended contained population variances ranging from a high district of 447,395 and a low district of 410,528 (Stip. Ex. 8; R. 59). Senator Avery thereafter moved that Senate Committee Substitute for Senate Bill No. 182 as amended be adopted. Said motion was carried and the Senate Committee Substitute was declared perfected and ordered printed. On April 13, 1967, the Senate Committee Substitute as perfected was read for the third time in the Senate and passed by the vote of 28 Yeas, 5 Nays and 1 Absent. The President of the Senate declared the Bill passed. As passed by the Senate, [Perfected] Senate Committee Substitute for Senate Bill No. 182 outlined congressional districts containing a high population of 444,071 and a low population of 423,868 (Stip. Ex. 7; R. 59).

Thereafter, [Perfected] Senate Committee Substitute for Senate Bill No. 182 was received by the House of Representatives and after being read for the second time on April 26, 1967, was referred to the House Committee on Congressional Redistricting. On June 7, 1967, the Chairman of the House Committee on Congressional Redistricting submitted his report to the House assembled, said report being that the committee recommended its House Committee Substitute to Senate Committee Substitute for Senate Bill 182 do pass. This House Committee Substitute contained congressional districts varying from a high population of 444,390 to a low population of 418,325 (Stip. Ex. 9, R. 59). On June 14, 1967, the House Committee Substitute was considered by the House and upon vote was defeated with 53

Representatives voting for the Bill, 108 Representatives voting against the Bill, one Representative not voting, and 1 Representative absent. The Senate Committee Substitute for Senate Bill No. 182 was then considered by the House, amendments thereto were offered by Representatives Volkmer, Hibler, Kennedy, Schapeler, and Dale, and all of said amendments were defeated upon a roll call vote of the House, the closest such vote being 73 for, 87 against (Stip. Ex. 11, p. 9; R. 59). A sixth amendment was offered by Representative Sponsler but was not voted upon that date and was subsequently withdrawn by Representative Sponsler on June 19, 1967 (Stip. Ex. 11, p. 11; R. 59).

On this same date, June 19, 1967, the House took up Senate Committee Substitute for Senate Bill No. 182 as a special order of business and Representative Rabbitt, the Majority Floor Leader, offered House Substitute for Senate Committee Substitute for Senate Bill No. 182. This House Substitute, upon vote, was adopted with 82 Representatives voting for the Bill, 80 Representatives voting against the Bill, and 1 Representative absent. The House Substitute was read for the third time and was passed upon roll call vote with 84 Ayes, 76 Noes, 1 present but not voting, and 2 absent. The Speaker of the House declared House Substitute for Senate Committee Substitute for Senate Bill No. 182 passed (Stip. Ex. 11, pp. 13-14; R. 59). Said House Substitute was formulated by an informal committee of Representatives and while incorporating substantially all of the House amendments which had been previously defeated on the Floor of the House, it also adhered closely to the [Perfected] Senate Committee Substitute for Senate Bill No. 182 as agreed upon by the Senate (A. 64-65). This House Substitute was subsequently enacted by the General Assembly and according to its sponsors it contained population variances from a high district of 442,302 to a low district of 423,815 (Ex. HD A, A. 71).

On June 22, 1967, the Senate took up for consideration the House Substitute for Senate Committee Substitute for Senate Bill No. 182 and Senator Young offered his Senate Substitute (S.B. No. 107) for the House Substitute (Stip. Ex. 1). After an objection to this Senate Substitute as being out of order was overruled, it was voted upon and defeated by the Senate with 8 Senators voting Yea and 26 Senators voting Nay (Stip. Ex. 11, p. 15; R. 59). Said Senate Substitute as drawn by Senator Young, contained congressional districts that varied from a high population of 444,252 to a low population of 417,399 (Stip. Ex. 1, R. 59). Thereupon, following a recess, House Substitute for Senate Committee Substitute for Senate Bill No. 182, was voted upon and defeated with 11 Yeas, 19 Nays, and 4 Absents (Stip. Ex. 11, p. 15; R. 59). A Senate motion that the House be requested to recede from its position on the House Substitute was adopted, but on June 27, 1967, the House upon roll call vote refused to so recede; 104 Representatives voting Aye, 57 Representatives voting No on the refusal, 2 Representatives being absent (Stip. Ex. 11, p. 16; R. 59). Upon being informed of the refusal of the House to recede from its House Substitute for Senate Committee Substitute for Senate Bill No. 182, the Senate on July 27, 1967, during an evening session again voted on the House Substitute and adopted same by a vote of 30 Yeas, 3 Nays and 4 Absences (Stip. Ex. 11, p. 17; R. 59). The House Substitute for Senate Committee Substitute for Senate Bill No. 182 was thereupon read for the third time and passed upon a vote of 29 Yeas, 3 Nays, 2 Absences, and was declared passed by the President of the Senate.

## OTHER PROPOSED BILLS.

Other Bills offered in the 74th General Assembly relating to congressional redistricting and not already alluded to were the following:

House Bill No. 870, was offered by Representative Belt on March 16, 1967, read for the first time on that date, read for the second time on March 20 and on March 22 it was referred to the Committee on Congressional Redistricting where it remained for the duration of the session (Stip. Ex. 4; R. 59). This proposed Bill contained four whole-county congressional Districts ranging in population from 438,733 to 427,972. The urban districts therein are of indeterminate population (Stip. Ex. 4, R. 59).

On February 9, 1967, Representative Dill and others introduced House Bill No. 399, which was read for the first time on that date, on the second time on February 13, and on February 15 it was referred to the Committee on Congressional Redistricting, where it remained for the duration of the session. An examination of the districts discloses that in many instances districts are described by highways, railroad lines, river channels and city streets. Defendants have been unable to verify population figures in such districts. Only the populations of the four rural districts can be computed in this Bill, and these vary from a most populated of 434,111 to a least populated of 427,290. The six urban districts in the Bill contain such fragmentation of wards and townships that their populations cannot be calculated. However, it should be noted that in this proposed Bill, Ward 21 of the City of Kansas City, containing a population of 35,168 was placed in both the 4th and 6th Districts (Stip. Ex. 2; R. 59).

House Bill No. 449 was introduced by Representative Troupe and others and read for the first time on February 15, 1967, for the second time on February 16, and on February 23 it was referred to the Committee on Congressional Redistricting where it remained for the duration of the session. House Bill 449 contained four whole-county congressional districts ranging in population from a high of

443,816 to a low of 421,616. Its urban district populations cannot be ascertained (Stip. Ex. 3; R. 59).

A description and chronology of congressional redistricting Bills considered is tabulated as follows:

**CONGRESSIONAL REDISTRICTING BILLS INTRODUCED BUT NOT ENACTED: 74TH GENERAL ASSEMBLY OF MISSOURI**

| Bill & Sponsor | Date Introduced | Most Populated Dist. | Least Populated Dist. |
|---|---|---|---|
| SB No. 107<br>Senator Young* | Jan. 18, 1967<br>June 22, 1967 | 6th—444,252 | 7th—417,399 |
| SB No. 182<br>Senator Avery | Jan. 26, 1967 | 3rd—448,824 | 7th—423,103 |
| HB No. 399<br>Rep. Dill* | Feb. 9, 1967 | 10th—434,110 | 6th—427,290 |
| HB No. 449*<br>Rep. Troupe, et al | Feb. 15, 1967 | 8th—443,816 | 7th—421,616 |
| HB No. 870*<br>Rep. Belt, et al | March 16, 1967 | 10th—438,773 | 7th—427,972 |
| SCS SB 182<br>Sen. Avery | March 21, 1967 | 3rd—446,965 | 10th—423,868 |
| SCS SB 182 (Perfected)<br>Sen. Vanlandingham | April 4, 1967 | 1st—444,071 | 10th—423,868 |
| SS SB [illegible]. 182<br>Sen. Johnson* | April 4, 1967 | 5th—440,371 | 4th—426,603 |
| Perfecting Amendments SSSB No. 182<br>Senators Waters, Johnson & Cox | April 5, 1967 | 6th—447,395 | 4th—410,528 |
| HCS, SCS, SB 182<br>Rep. Copeland | June 7, 1967 | 10th—444,390 | 4th—418,325 |
| HA No. 1, SCS, SB No. 182<br>Rep. Volkmer | June 14, 1967 | 1st—444,071 | 2nd—425,527 |
| HA No. 2, SCS SB No. 182<br>Rep. Hibler | June 14, 1967 | 1st—444,071 | 4th—419,720 |
| HA No. 3, SCS SB No. 182<br>Rep. Kennedy | June 14, 1967 | 1st—444,071 | 7th—417,399 |
| HA No. 4 SCS SB No. 182<br>Rep. Schapeler | June 14, 1967 | 1st—444,071 | 4th—421,955 |
| HA No. 5 SCS SB No. 182<br>Rep. Dale | June 14, 1967 | 1st—444,071 | 10th—423,868 |

*Table considers only whole-county districts with ascertainable populations.

## ARGUMENT.

### 1.

**The opinion, decision and judgment appealed from erroneously found that the 1967 Missouri Congressional Redistricting Act, House Substitute for Senate Committee Substitute for Senate Bill No. 182, 74th General Assembly of the State of Missouri, does not comply with Article I, Section 2, Constitution of the United States, and is unconstitutional and void. Population was the principal factor considered by the legislature in enacting this law, and the minor variations in the populations of the resulting congressional districts fully comply with the constitutional requirement that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's. The 1967 Missouri Congressional Redistricting Act complies with Article 1, Section 2, Constitution of the United States, is in harmony with all applicable constitutional principles and is valid.**

In **Wesberry v. Sanders**, supra, this court construed Article I, Section 2, of the Constitution of the United States, to require "* * * that as nearly as is practicable, one man's vote in a congressional election is to be worth as much as another's * * *". As a result of this landmark decision, the statute creating congressional districts in the State of Missouri was contested as to its constitutional validity in the United States District Court for the Western District of Missouri. The largest district had a population of 128,355 in excess of the population of the smallest district. Although this population disparity in congressional districts was far less than the population disparity in congressional districts in many of the several states, it was obvious that the act creating the districts did not meet the population requirements of the constitution and the act was invalidated.

It is the tradition of the State of Missouri to respect and not deny the law of the land. In 1965 the legislature of the

State of Missouri attempted to enact a law establishing congressional districts which would comply with the population requirements of the constitution. At that time the notion was in vogue that congressional districts which would not vary from an average mathematical ideal district by more than 10% were constitutionally permissible. The 1965 act created districts in which the population of the largest district and the population of the smallest district varied from the population of an ideal district by slightly less than 10%. This act was invalidated by the United States District Court and the judgment of the lower court was affirmed by this court. The efforts of the Missouri Legislature in 1965 resulted from a misconception of the law rather than from any deliberate attempt to see how far it was permissible to stray from strict mathematical equality in congressional districts.

In 1967 the Missouri Legislature again undertook the task of enacting legislation creating congressional districts which would comply with the population requirements of the Constitution of the United States. The evidence reflects that population equality among the congressional districts was the fundamental goal of the legislature in its deliberations. In working towards this goal of population equality in the districts, the legislature utilized the 1960 census figures for the State of Missouri and for its political subdivisions.

Although population equality among the various districts was the fundamental goal of the legislature, recognition was given to other considerations. The State of Missouri is constituted by 114 counties and the City of St. Louis. In 1960 the City of St. Louis had a population in excess of 700,000, St. Louis County had a population in excess of 700,000 and Jackson County, which includes most of the City of Kansas City, had a population in excess of 600,000.

In drawing congressional districts, the legislature recognized the integrity of counties throughout the state with the exception of the City of St. Louis, St. Louis County, and Jackson County. Thus counties were not split by the congressional districts with the exception of the three metropolitan political subdivisions referred to tbove.

Article III Section 45 of the Missouri Constitution provides that congressional districts should be compact and contiguous in area. In enacting the 1967 act, the Missouri Legislature tried to give effect to this provision of the Missouri Constitution and recognition was given to compactness and contiguity in establishing the districts. Certain counties and certain communities historically and traditionally share political and social interests. Such communities and such counties had a common interest in being within the same congressional district. In enacting the 1967 law, the legislature gave some recognition to these historical and traditional interests.

The end product of the legislative efforts was a law creating congressional districts which the members of the legislature believed varied in population from a mathematically ideal district by 10,321 people in excess of an ideal district and 8,166 people less than an ideal district. The population of the largest district would have been 2.39% in excess of an ideal district and the population of the smallest district would have been 1.89% less than an ideal district. The population of the largest district would have been 18,487 in excess of the smallest district with a resulting ratio of the largest district to smallest district of 1.04.

The lower House of the legislature is composed of 163 members and the upper House is composed of 34 members (A. 117). At least 16 separate congressional redistricting plans had been considered from January 18, 1967 through

June 27, 1967. Many committee meetings had been held and amendments had been offered, some of which were adopted, some of which were defeated. Extensive legislative consideration had been given to this subject matter. In the course of this extensive legislative process inaccuracies in the population calculations of the proposed districts had arisen. These inaccuracies are admitted by everyone involved in this case to be innocent and in no way intended. (However the lower court insinuates that the inaccuracies may have been willful and prompted by some sinister motivations.) (Footnotes to Appendices to Jurisdictional Statement, p. 17, 279 F.Supp. l.c. 956)

After the commencement of the litigation, the inaccuracies referred to above were discovered. The correct population figures as furnished by the Bureau of Census reflected that the largest district had a population of 13,542 in excess of an ideal district and the smallest district had a population of 12,260 less than an ideal district. The largest district had a population of 3.13% in excess of ideal and the smallest district had a population of 2.83% less than ideal. The population of the largest district exceeded that of the smallest district by 25,802 with a resulting ratio of the largest to smallest district of 1.06.

Appellants contend that these congressional districts comply with the population requirements of Article I, Section 2 of the Constitution. It is the intention of the Constitution to protect the voter and to permit the voter to have an equal voice in the selection of his congressmen with all other voters. Absolute equality to any voter with all other voters in the selection of congressmen is recognized to be a standard impossible of achievement. Thus voters in all congressional districts throughout the United States exercise the right to elect members of Congress with varying degrees of equality. In measuring the right of a voter to

choose a member of Congress in relation to the rights of other voters to elect other members in Congress, the question becomes whether or not one voter's right has been unconstitutionally diluted in favor of other voters' rights. Congressional districts have no rights, constitutionallly or otherwise. Thus the fact that one congressional district may have 10,000 more people or 25,000 more people than another congressional district is not in and of itself significant or controlling in a determination of voting rights. The weight of a person's vote in the larger district in relation to the weight of a person's vote in the smaller district is the significant question. Therefore, numbers alone can be misleading. The dilution of the vote in the larger district can be expressed with meaning in terms of percentage or ratio rather than in terms of whole numbers. The right to vote guaranteed by the Constitution is not violated unless the dilution is significant.

Thus, in exercising judgment as to whether or not a citizen's right to vote has been unconstituionally diluted ultimately a point of rather sophisticated refinement is reached. If a larger district has twice as many voters as a smaller district, it is obvious that the right to vote in the larger district has been diluted 2 to 1. If the larger district has half again as many voters as the smaller district, the dilution of the vote in the larger district is 1.5 to 1. In the 1965 Missouri Congressional Redistricting Act the larger district exceeded the population of the smaller district by 20%. This vote dilution in the larger district in relation to the smaller district of 1.2 to 1 was found by the lower court to be unconstitutional, and this decision was upheld by this court in **Kirkpatrick v. Preisler**, supra.

In recognition that population equality among congressional districts cannot be achieved (or more to the point, equal number of voters among congressional districts) the

task at hand is to determine at what point unconstitutional and unlawful voter dilution occurs among congressional districts unequal in population. Although this question is not subject to mathematical measurement, it must of necessity be examined from the point of view as to what departure from an absolute 1 to 1 ratio is constitutionally permissible. It is proper to examine the question in its mathematical terms and to relate the question in its mathematical terms, together with all of the accompanying facts, circumstances and considerations, and to reach a conclusion based upon the common experience of man as to whether or not voting rights have been unlawfully infringed upon. An examination of the departures from a 1 to 1 ratio which have been found by this court to violate the Constitution, together with an examination of the departures from a 1 to 1 ratio which have been approved by this court as meeting the requirements of the Constitution, is relevant to a constitutional judgment in regard to the 1967 Missouri Act.

The good faith efforts of the Missouri Legislature resulted in districts believed by the legislature to produce extremes in the population of districts of 1.04 to 1. The results in fact were population differences of 1.06 to 1. An examination of the decisions of this court discloses that a finding by the lower court that an act was unconstitutional in which the population ratio of the largest district to the smallest district was approximately 1.2 to 1 was affirmed; **Kirkpatrick v. Preisler**, supra. In addition, this court reversed a lower court which had upheld the validity of a congressional redistricting act in which the ratio of the largest district to the smallest district was approximately 1.2 to 1; **Duddleston v. Grills**, (Ind.) 385 U.S. 455. Appellants do not find any case before this court in which the court has invalidated congressional districts with a ratio of less than 1.2 to 1 between the largest and smallest dis-

tricts. Subsequent to **Kirkpatrick v. Preisler**, supra and **Duddleston v. Grills**, supra, cases were before the court in which ratios in excess of 1.2 to 1 were held to be constitutionally impermissible, e.g., **Rockefeller v. Wells**, (N.Y.) 389 U.S. 421, approximately 1.30 to 1; and **Lucas v. Rhodes**, (Ohio) 389 U.S. 212, approximately 1.35 to 1.

On the other hand several cases have been before the court in which the population inequality of congressional districts has been found to be constitutionally permissible. In **Kirk v. Gong**, — U.S. —, 19 L.Ed.2d 784, congressional districts for the State of Florida which were established by the lower court were found to be constitutionally permissible. The population of the districts as calculated by the court had a ratio of approximately 1.02 to 1 between the largest and the smallest district. However, the court's calculations were inaccurate, and correct calculations by the Census Bureau reflected a ratio of approximately 1.12 to 1. In **Alton v. Tawes**, 384 U.S. 315, districts created by the court with a ratio of approximately 1.025 to 1 were found to be constitutionally permissible. In **Dinis v. Volpe**, — U.S. —, 19 L.Ed.2d 785, congressional districts with a ratio of approximately 1.02 to 1 were found to be constitutionally permissible. In **Connor v. Johnson**, 386 U.S. 483, congressional districts with a ratio of approximately 1.06 to 1 were found to be constitutionally permissible.

It is noted that the highest ratio between congressional districts which has been found to be constitutionally permissible by this court is 1.06 to 1 (with the exception of **Gong v. Kirk**, ratio 1.12 to 1, discussed below). The lowest ratio found to be constitutionally impermissible by this court is 1.2 to 1. Although all of these cases have been summarily decided by the court, it appears to appellants that this court has approved population inequalities among congressional districts in the approximate ratio of 1.06 to 1.

Thus, Missouri with an intended population ratio of 1.04 to 1 and an actual population of 1.06 to 1 between the largest and smallest district meets the apparent requirements of this court.

As has been demonstrated above, one congressional redistricting case has been affirmed by this court in which the population ratio between the largest and smallest district of 1.06 to 1 is identical with the ratio between the Missouri districts, **Connor v. Johnson**, supra. The actual population difference between the largest and smallest district in that Mississippi case was 26,265. In Missouri the intended population difference was 18,487, and the actual population difference was 25,802 or less than in Mississippi. Furthermore, in **Gong v. Kirk**, supra, this court approved congressional districts in the State of Florida drawn by the lower court with an intended population difference between the largest and smallest district of 8,027, but with an actual population difference of 48,824. Thus, the population difference in the Florida districts is almost twice as much as in the Missouri districts. These two cases are a forceful demonstration that the 1967 Missouri Congressional Redistricting Act meets the population requirements of Article I, Section 2, Constitution of the United States.

Furthermore, appellants do not find a single decision of a lower court, federal or state, in which a congressional redistricting act with population variations as low as those found in the Missouri Act have been invalidated pursuant to Article I, Section 2, United States Constitution. In fact, appellants find no decision in which congressional districts which have a population inequality double of that existing in the Missouri districts have been invalidated. An examination of the many decisions of the lower court in regard to congressional redistricting which have been decided subsequent to **Wesberry v. Sanders**, supra, reflects that the

State of New Jersey in **Jones v. Falcey**, 222 A.2d 101 (N.J. 1966) invalidated a congressional redistricting plan with a population inequality between the largest and smallest district of 57,978. This population inequality between congressional districts which is more than double the population disparity found in the Missouri districts appears to be the lowest population inequality judicially invalidated by any federal or state court.

It should also be noted that numerous congressional redistricting plans have been approved by lower courts (some such plans have in fact been drawn by the lower courts) with population inequalities among the districts approximately double the population inequality among the Missouri districts. See:

**Klahr v. Goddard**, 250 F.Supp. 537, (D. Ariz. 1966);

**Silver v. Reagan**, 434 P.2d 621, (Cal. 1967);

**Kirby v. Illinois State Electoral Board**, 251 F.Supp. 908, (Northern Dist. Ill. 1965);

**Levitt v. Maynard**, 216 A.2d 778, (N.H. 1966);

**Wells v. Rockefeller**, — F.Supp. —, (N.Y. March 20, 1968).

Subsequent to **Wesberry v. Sanders**, supra, the population requirements of Article I, Section 2, Constitution of the United States, in congressional districts has resulted in much litigation in the federal and state courts. Appellants have attempted to collect citations to all of such cases which are tabulated below with relevant information.

| State | Case | High Pop. In Plan Under Review | Low Pop. In Plan Under Review | Disparity | Comments |
|---|---|---|---|---|---|
| Ala. | Moore v. Moore, 229 F.Supp. 435 (SD Ala. 1964) | 634,864 | 236,216 | 398,648 | Plan voided |

| State | Case | High Pop. In Plan Under Review | Low Pop. In Plan Under Review | Disparity | Comments |
|---|---|---|---|---|---|
| | Moore v. Moore, 246 F.Supp. 578 (SD Ala. 1965) | 438,130 | 383,625 | 44,505 | Plan approved |
| Ariz. | Klahr v. Goddard, 250 F.Supp. 537 (D Ariz. 1966) | 663,510 | 198,236 | 465,274 | Plan voided |
| | | 461,495 | 400,251 | 61,644 | Court plan |
| | | 456,529 | 405,217 | 51,312 | Subsequent legislative plan |
| Ark. | Park v. Faubus, 238 F.Supp. 62 (ED Ark. 1965) | 575,385 | 332,844 | 242,541 | Plan voided |
| | | 453,567 | 443,892 | 9,675 | Present plan |
| Calif. | Silver v. Reagen, 432 P.2d 26 (Cal. 1967) | 588,933 | 301,872 | 207,061 | Plan voided |
| | Silver v. Reagen, 434 P.2d 621 (Cal. 1967) | 446,974 | 392,756 | 54,218 | Plan approved |
| Florida | Gong v. Bryant, 230 F.Supp. 917 (SD Fla. 1964) | 660,335 | 237,235 | 423,100 | Plan approved for 1964 election void thereafter |
| | Gong v. Kirk, 278 F.Supp. 133 (SD Fla. 1967) | 465,160 | 374,665 | 90,495 | Plan approved for 1966 election void thereafter |
| | Aff'd—U.S.—, 19 L.E.2d 784, 88 S.Ct.— | 415,704 | 407,677 | 8,027 | Court plan using estimated pop. |
| | | 448,885 | 400,061 | 48,824 | Bureau of Census determination of pop. in court's plan |
| Georgia | Wesberry v. Vandiver, 206 F.Supp. 276 (ND Ga. 1962) | 823,680 | 272,154 | 551,526 | Plan approved |
| | Wesberry v. Sanders, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed 2. 481 (1964) | 823,680 | 272,154 | 551,526 | Reversed and remanded |
| | | 455,575 | 329,738 | 125,837 | Present plan |

| State | Case | High Pop. In Plan Under Review | Low Pop. In Plan Under Review | Disparity | Comments |
|---|---|---|---|---|---|
| Ill. | Kirby v. Ill. State Electoral Bd. 251 F.Supp. 908 (ND Ill. 1965) | 552,582 | 278,703 | 274,881 | Plan voided |
| | People ex rel. Scott v. Kerner, 211 N.E.2d 736 (Ill. 1965) | 451,527 | 394,481 | 57,046 | Federal & State Court Plan |
| Indiana | Grills v. Branigin, 255 F.Supp. 155 (SD Ind. 1966) | 454,208 | 369,663 | 84,545 | Plan approved |
| | Duddleston v. Grills, 385 U.S. 455, 870 S.Ct. 611, 77 L.Ed 578 (1967) | 454,208 | 369,663 | 84,545 | Reversed and remanded |
| | Grills v. Branigin —Fed. Supp.— (SD Ind. Feb. 14, 1968) Appeal Pending | 428,197 | 417,158 | 11,039 | Court plan |
| Kansas | Meeks v. Anderson, 299 F.Supp. 271 (D Kan. 1964) | 539,592 | 373,583 | 166,009 | Plan voided |
| | Meeks v. Avery, 251 F.Supp. 245 (D Kan. 1966) | 459,063 | 394,056 | 65,007 (Fed. census) | Plan approved |
| | | 442,677 | 427,617 | 15,060 (state census) | |
| Kentucky | Clark v. Carter, 218 F.Supp. 448 (ED Ky. 1963) | 610,947 | 350,839 | 260,108 | Plan approved |
| | | 457,688 | 417,544 | 40,144 | Present plan |
| Md. | Md. Citizen Com. for Fair Cong. Redist. v. Tawes, 228 F.Supp. 957 (D Md. 1964) | 443,331 | 329,826 | 113,505 | Plan approved only for 1964 elections |
| | Md. Citizen Com. for Fair Cong. Redist. v. Tawes, 253 F.Supp. 731 (D Md. 1966) Aff'd. 384 U.S. 315 | 393,210 | 383,237 | 9,973 | Court plan |

| State | Case | High Pop. In Plan Under Review | Low Pop. In Plan Under Review | Disparity | Comments |
|---|---|---|---|---|---|
| Mass. | Dinis v. Volpe, 264 F.Supp. 425 (D Mass. 1967) | 478,962 | 376,336 | 102,626 | Plan voided |
| | Dinis v. Volpe, —F.Supp— (D Mass. 1967) Aff'd. —U.S.—, 88 S.Ct. 692, 19 L.Ed.2d, 785 | 433,240 | 424,524 | 8,716 | Plan approved |
| Michigan | Calkins v. Hare, 228 F.Supp. 824 (ED Mich. 1964) | 494,086<br>417,026 | 304,984<br>403,263 | 188,102<br>13,763 | Plan voided<br>Present plan |
| Miss. | Connor v. Johnson, 279 F.Supp. 619 (SD Miss. 1966) Aff'd. 386 U.S. 843 | 608,041 | 295,072 | 313,969 | Plan repealed by legislature after reapportionment suit filed. |
| | | 449,565 | 423,300 | 26,265 | Plan approved |
| Mo. | Preisler v. Sec. of State of Mo., 238 F.Supp. 187 (WD Mo. 1965) | 506,854 | 378,499 | 128,355 | Plan voided |
| | Preisler v. Sec. of State of Mo., 257 F.Supp. 953 (WD Mo. 1966) Aff'd. 385 U.S. 450 | 474,895 | 390,240 | 84,655 | Plan approved for 1966 election, void thereafter. |
| | Preisler v. Sec. of State of Mo., 279 F.Supp. 952 (WD Mo. 1967) Prob. Juris. Noted—U.S.— | 445,523 | 419,721 | 25,802 | Plan voided |
| Mont. | Roberts v. Babcock, 246 F.Supp. 396 (D Mont. 1965) | 400,573 | 274,194 | 126,379 | Plan voided |
| | | 347,701 | 327,019 | 20,682 | Court plan |
| Neb. | Exon v. Tiemann, 279 F.Supp. 603 (D Neb. 1967) | 531,098 | 404,695 | 126,403 | Plan voided |
| | Exon v. Tiemann, 279 F.Supp. 609 (D Neb. 1968) | 507,330 | 414,887 | 92,443 (Fed. census) | Plan approved |
| | | 512,446 | 494,768 | 17,678 | (State University estimate) |

| State | Case | High Pop. In Plan Under Review | Low Pop. In Plan Under Review | Disparity | Comments |
|---|---|---|---|---|---|
| N. Hamp. | Levitt v. Maynard, 202 A.2d 478 (NH 1964) | 331,818 | 275,103 | 56,715 | Plan approved |
| | Levitt v. Maynard, 216 A.2d 778 (NH 1966) | 331,818 | 295,103 | 56,715 | Plan approved |
| N. Jersey | Jones v. Falcey, 222 A.2d 101 (NJ 1966) | 439,756 | 374,996 | 57,978 | Plan voided |
| | | ? | ? | ? | Present plan |
| New York | Wells v. Rockefeller, 273 F.Supp. 984 (SD NY 1967) Aff'd. 389 U.S. 421 | 471,001 | 350,635 | 120,366 | Plan voided |
| | Wells v. Rockefeller— F.Supp.— (March 20, 1968) | 435,880 | 382,277 | 53,673 | Plan approved |
| N.C. | Drum v. Seawell, 249 F.Supp. 877 (MD NC 1965) Aff'd. 383 U.S. 831 | 491,461 | 277,861 | 213,600 | Plan voided |
| | Drum v. Seawell, 250 F.Supp. 922 (MD NC 1966) | ?(+8.39%) | (−8.91%) | 71,640 | Plan approved for 1966 election only. Void thereafter. |
| | Drum v. Seawell, 271 F.Supp. 193 (MD NC 1967) | 423,750 | 406,474 | 17,276 | Plan approved |
| Ohio. | Lucas v. Rhodes, —F.Supp.—(ND Ohio 1967) | 457,774 | 319,968 | 137,806 | Plan approved |
| | Lucas v. Rhodes, 389 U.S. 212, 19 L.Ed.2d 423, 88 S.Ct. 416 | 457,774 | 319,968 | 137,806 | Reversed and remanded |
| | Lucas v. Rhodes, —F.Supp.—(ND Ohio, 1968) | 409,939 | 400,058 | 9,881 | Plan approved |
| Tenn. | Baker v. Clement, 247 F.Supp. 886 (MD Tenn. 1965) | 453,298 | 341,468 | 111,830 | Plan approved 1966 election. Void thereafter. |

| State | Case | High Pop. In Plan Under Review | Low Pop. In Plan Under Review | Disparity | Comments |
|---|---|---|---|---|---|
| | Baker v. Ellington, 273 F.Supp. 174 (MD Tenn. 1967) | 404,968 | 388,204 | 16,728 | Court plan |
| Texas | Bush v. Martin, 224 F.Supp. 499 (SD Tex. 1963) Aff'd. 376 U.S. 222 | 687,151 | 216,371 | 470,780 | Plan approved for 1964 election. Void thereafter. |
| | Bush v. Martin, 251 F.Supp. 484 (SD Tex. 1966) | 457,092 | 376,200 | 80,892 | Plan approved for 1964 election. Void thereafter. |
| | | 450,353 | 387,794 | 62,559 | Present plan |
| Virginia | Wilkins v. Davis, 139 S.E.2d 849 (Va. 1965) | 527,098 | 312,890 | 214,208 | Plan voided |
| | | 419,642 | 377,511 | 42,131 | Present plan |
| Wash. | Thigpen v. Meyers, 211 F.Supp. 826 (WD Wash, 1962) Aff'd. on other Ginds 378 U.S. 554, 12 L.Ed.2d 1024, 84 S.Ct. 1905 | 510,512 | 342,540 | 167,972 | Plan approved |
| | | 444,857 | 353,158 | 91,699 | Present plan |

It has been appellants' purpose in this discussion to demonstrate that the population inequalities in the 1967 Missouri congressional districts established by the 1967 Missouri Congressional Redistricting Act are constitutionally permissible. It has been appellants' purpose to demonstrate the constitutional validity of the Missouri Act by citation to cases before this court as well as many cases before lower courts. Appellants recognize that what is constitutionally permissible in congressional districts in one state is not conclusive upon the constitutional validity of a congressional plan in another state. However, where a pattern has been established by learned members of lower courts throughout the country and where a pattern is developing among the cases which have been summarily affirmed by this court, comparisons become persuasive.

Absolute voter equality has been recognized as a standard impossible of achievement. The extent to which voter inequalities are constitutionally impermissible depends to a large extent upon the intangible and indefinable standard of common sense and good judgment. It should be readily admissible that minor variations in the population of congressional districts do not result in unconstitutional voter inequality. It has been appellants' purpose to demonstrate that the population inequalities in the Missouri congressional districts are minor.

Although it is apellant's contention that the population inequalities among the districts are constitutionally permissible per se, the other considerations recognized by the legislature in enacting these districts into law add justification to these minor population variations. As discussed above, the legislature maintained the integrity of county lines with the exception of political subdivisions in the major metropolitan areas of the state. Compactness and contiguity of the districts was recognized as directed by Article III, Section 45, of the Missouri Constitution. Historical and traditional interests were given some recognition.

In addition to these justifications, the evidence reflected that population factors which were peculiar to the largest district, the 8th, were taken into consideration. This district with a population of 445,523 included a great number of transitory and nonvoting citizens. The district includes Fort Leonard Wood which has a military reservation housing approximately 35,000 nonresident and thus nonvoting soldiers. The district includes the University of Missouri in Boone County with a nonvoting student population of approximately 17,000. The district includes Jefferson City, the state capitol, with many inhabitants who maintain a voting residence in other parts of the state. The district

also includes nonresident student population at Lincoln University and Rolla School of Mines, a branch of the University of Missouri, with approximately 4,000 students. The evidence reflects that this nonvoting population was taken into consideration in establishing the 8th District.

The transitory and nonvoting nature of the population referred to above is demonstrated by the evidence in regard to the election returns from Pulaski County wherein Ft. Leonard Wood is situated. A comparison of Pulaski County with all of its adjacent counties in the matter of total vote in relation to the county population in the most recent presidential election reflects that this county of 46,000 population compares with neighboring counties of approximately 10,000 from a voting standpoint.

**TOTAL VOTE TO POPULATION—PRESIDENTIAL ELECTION NOV. 1964**

| County | 1960 Population | Total Votes | Percent of Votes |
|---|---|---|---|
| Phelps | 25,396 | 9,531 | 37.5 |
| Laclede | 18,991 | 8,365 | 44.0 |
| Texas | 17,758 | 7,836 | 44.1 |
| Miller | 13,800 | 6,642 | 48.1 |
| Camden | 9,116 | 5,129 | 56.2 |
| Maries | 7,282 | 3,246 | 44.5 |
| PULASKI | 46,567 | 5,239 | 11.2 |

Source—Page 1176, Official Manual of Missouri; 1965-66; Pages 27-13, 14, US Census Population; 1960, Number of Inhabitants, Missouri, Final Report PC (1-27A).

The lower court rejected the consideration of this transitory nonvoting population on the basis of **Davis v. Mann**, 377 U.S. l.c. 691, 12 L.Ed.2d 617, (pages 46-47 Appendices to Jurisdictional Statement, 279 F.Supp. l.c. 94).

The authority relied on by the lower court does not prohibit consideration of transitory nonresident personnel in drawing legislative districts. In fact this court sanctioned the exclusion of transitory nonresident population from legislative reapportionment deliberations in **Burns v. Rich-**

ardson, 384 U.S. 73, 16 L.Ed.2d 376, l.c. 391. Appellants emphasize that the legislature made no attempt to reflect the entire impact of transitory nonresident population in drafting the 8th district. The factor of such transitory nonresident population was simply another consideration recognized in the legislative deliberations (A. 88).

The reasonableness of the population differences in the congressional districts under review must also be viewed in the context of legislative interplay. The legislative leaders all testified that the act in question was in their opinion a reasonable legislative compromise. The lower house of the Missouri Assembly has 163 members of which 107 are members of the Democratic Party and 56 members of the Republican Party. The upper House consists of 34 members with 23 members of the Democratic Party and 11 members of the Republican Party. The individual members of the legislature reflect the interests of their constituents as well as the interests of their political affiliation. On final enactment of the 1967 Congressional Redistricting Act, all of the Republican Members of the lower House voted against enactment (Stipulated Exhibit 11, page 13). However in testimony before the court the leader of that party in the lower House testified that the act represented a reasonable legislative compromise and the population variations in the districts seem minor in the context of legislative interplay. He further testified that if his party had been in control of the legislature, the political complexion of the districts would have been different but in all probability the population variations would have been about the same (A. 96 and 98). Prior to final consideration in the upper House all members of the Republican Party had voted against enactment of the bill (Stipulated Exhibit 11, page 16). However, upon final vote, all but one member of the Republican Party voted for enactment in the House (Stipulated Exhibit 11,

page 17). The leader of that party in the Senate, in testimony before the court, stated that although he did not favor the political complexion of the districts created by the bill, he considered the bill to be a reasonable legislative compromise (A. 93).

It must be remembered that the establishment of congressional districts is a legislative function and that practical political problems are inherent in the enactment of congressional reapportionment legislation. If the power of congressional reapportionment resided in the hands of one man who was subject to a strict judicial accounting for mathematical exactness in the population of the districts, mathematical equality could be reached. As a legislative function the courts must recognize as legitimate a consideration of legislative interplay. Other lower courts have recognized the legislative nature of this problem. In **Wells v. Rockefeller**, 66—Civil—1976 SD NY, March 26, 1968 not reported, the court in considering a legislative act establishing congressional districts commented upon the legislative nature of this function as follows:

> "Since no proof has been submitted that the Legislature acted in contravention of the precepts of the Supreme Court with respect to congressional reapportionment, the objections of plaintiffs and objectants are overruled. The Legislature is now constitutionally constituted. In theory at least, the people of the State are being represented by senators and assemblymen of their choice. No matter how lines are drawn, some candidate of some party will always win, be his margin of victory ever so small. Under such circumstances, losing parties and candidates can always point to probable victories had the lines been drawn differently. **Our constitutional system calls for rendering unto the Legislature the things that are the Legislature's.** Reapportionment is

one of such things. Were each political party, and factions within each party, permitted to by-pass the Legislature by asking the courts to foist upon the electorate districts of their own draftsmanship and choosing, representative government would no longer exist. Self-interest would be substituted for majority rule. The courts cannot become pawns in such a political chess game. Here, for example, the plaintiffs apparently represent the State Committee of the Liberal Party and some of the intervenors appear to be associated with reform or independent groups within the Democratic Party. Courts should not enter the political arena at the behest of any party or group. The legislative body may be composed of the representatives of many parties and factions but primarily, as a result of their election, they are the representatives of the people. The task of reapportionment is for the Legislature. Its task here under all the facts and circumstances cannot be said to have been unconstitutionally performed" (emphasis added).

In **Exon v. Tiemann**, 279 F.Supp. 609, l.c. 612(DC Neb., February 1, 1968) the court commented as follows:

"Representative bodies must always act in the public interest and in redistricting matters must make an honest effort to achieve mathematical precision. However, mathematical precision can seldom, if ever, be achieved. This is true even if county lines are not followed."

In **Meeks v. Avery**, 251 F.Supp 245, l.c. 252 (DC Kan. 1966) the court commented on legislative discretion as follows: l.c. 252,

"[7] We find and hold that the Legislature of Kansas, by the enactment of the challenged statute, made a good faith effort to meet the constitutional standards

as set out in Wesberry v. Sanders, supra; that while mathematical perfection was not achieved, that goal was approached as nearly as the legislators in their good judgment believed to be practicable; that the legislature in enacting Chapter 13 did not exceed the permissible bounds of discretion in deviating from apportionment strictly according to population; that a population variance ratio between the most populous and least populous districts of 1.03521 meets minimal constitutional requirements."

The legislative nature of this problem is recognized in **Drum v. Seawell**, 271 F.Supp. 193, 195, (DS MD NC 1967) as follows:

"The constitutional standard enunciated in Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), is to legislative reapportionment what a hurdle is to a steeple chase: a minimum standard that must be cleared. **How** to clear it, so long as there is not gerrymandering for an invidious purpose, and by what optimum margin, are matters within the competence of the General Assembly. The court correctly decides that the plan of reapportionment adopted by the General Assembly of North Carolina is not in violation of the Constitution of the United States."

The legislative process is discussed in **Bush v. Martin**, 251 F.Supp. 484 (DC SD Tex. 1966) l.c. 509 and l.c. 510 as follows:

"**[18-22]** But this is not helpful to the plaintiffs since the goal is not mathematical precision. What is required is not merely that numerical equality be achieved as nearly as practicable. Rather, it is that in this legislative function, the **Legislature** achieve numerical equality as nearly as is practicable. That means

that until such time as the State Legislature indicates its complete unwillingness or inability to face up to the job, the apportionment, state and congressional, is for the Legislature, not the Courts. If—and the if is neither real nor big—it is a legislative function until default, then a proper regard for the separation of powers and the wide discretion necessarily reposed in each branch, must take into account that the Legislature is to employ its traditional methods and processes. This means that for the Legislature to be effective, it must enact legislation.[75] The enactment of legislation is left to a legislative body which exists under the broad commands of the republican form of government Guaranty Clause of Art. 4, § 4, of the Constitution. See Baker v. Carr, 1962, 369 U.S. 186, 218-219, 82 S.Ct. 691, 711, 7 L.Ed.2d 663, 687. Its duty is, of course, to act under the law. And the product may finally be rejected by a reviewing court. But no court can command that legislators agree, or that a majority of them must agree, or that they must agree within specified limits.

"[23] Of course certain minimum standards may be laid down against which the resulting legislative product will be tested. To this extent legislative freedom or discretion is, of course, confined or constricted. But if it is to be legislative action, and courts are to supplant legislative action only after a demonstrated default, then courts must be careful in specifying standards lest what is legislative in name turns out to be in fact merely a court-contrived plan under a more palatable mantel of legislation.

Inevitably some adjustment, some give-and-take, some compromise must come about. What one House of a

[75] In answer to the question whether he could draw a better bill, Mr. Johnson put his finger on the problem when he answered, "Yes, I imagine so, but I don't vote on them • • •"

bicameral Legislature might pass may be wholly unacceptable to the other, and vice versa. The fact that each (see notes 25 and 27, supra, and Appendix B and C) may have separately passed a bill with almost identical maximum deviations is no assurance at all that there is any common meeting ground between the two —no common meeting ground except a consciousness that some law has to be passed and a suitable adjustment must be found.[76] It is easy to attain near numerical equality. It can be done in an infinite number of ways —starting in the metropolitan areas and working out, starting in one corner and working outward, starting in the middle and working to the perimeter. But every effort requires that lines be drawn and the moment three lines are drawn, it affects adjacent, then more remote, and finally the most remote areas. As the examples of reconstituted districts in note 74, supra, reveals, it is no wonder that these legislator-witnesses spoke of the process as a "game of dominoes."

"[24-26] Thus the fact that districting within a 1%

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[76] In trying to ferret out the sources of disagreement between the House and the Senate precipitating the appointment of the Conference Committee and the reporting out of a bill increasing the total deviation from 12% to 19.4%, Mr. Johnson gave these answers:

"Q. Well, I think you said that my assumption in the previous question removed most of the sources of disagreement among the legislators. Now, my assumption related to what I characterized as political considerations; therefore is it not true that the sources of disagreement among the legislators were basically political considerations?

"A. * * * I think I can say yes to that.

"Q. So the difficulty in achieving the best districting bill lay primarily in factors which related in some way to politics; is that correct?

"A. Yes, sir.

"Q. The difficulty did not lie in a mechanical problem of drawing the districts in such a way as to achieve equality of population and compactness primarily?

"A. Of course, there is some difficulty * * * in the mechanics of drawing a district, but I think the primary considerations among the members were political."

tolerance is attainable by a process other than legislative cannot be the final test as to what is reasonable and practicable for legislative action. Courts, faithful to the concept of separation of powers, must recognize therefore the operative effect of so-called "political" factors so long as they do not represent invidious attacks on, or denials of, identifiable basic freedoms such as race or religion.[77] So long as the result passes muster on substantial numerical equality, these might include here such things as the desire to minimize as much as possible the pairing of incumbent congressmen in the transition from the old (unconstitutional) to the new districting,[78] the retention of counties as whole units, the retention so far as possible of former groupings of counties, and the like."

The problem is succinctly stated in **Connor v. Johnson**, 279 F.Supp. 619, l.c. 624 (SD Miss. 1966) affirmed 386 U.S. 483 as follows:

"The point is, however, that the balance in population among the five districts is as nearly perfect as 174 Legislators could ever be expected to agree upon as a distribution among 82 counties and the vote of every citizen, of whatever race, will now weigh equally in the selection of Representatives in Congress."

All of the above citations are part of a realistic recogni-

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[77] Moore v. Moore, S.D. Ala., 246 F.Supp. 578, Oct. 4, 1965 (per curiam):

"Although constitutional rights and principles cannot be ignored or made subordinate to political expediency, courts recognize the fact that legislative bodies in a democracy do not, and cannot perform and function according to a slide rule, or with mathematical precision and certainty. Democracy does not operate in that fashion. There remains the necessity of giving consideration to all legitimate contentions, interests and other appropriate factors involved in the legislative process."

[78] See paragraph 7 of the TLC recommendations, note 19, supra.

tion of the legislative process. Intelligent and wise judges have recognized, with approval, the nature of the legislative creature. The testimony of Senator Avery, Chairman of the Senate Reapportionment Committee, was to the point in much the same vein as follows (A. 117):

> "I might say it's mighty easy to set before the fireside and divide this state, and either one of us could do it very much better than this is done perhaps, but when you got 163 members of the House and 34 members of the Senate and everybody having equal privilege, right to consider a redistricting, it soon gets away from one man's thought about the state and how it should be districted."

Therefore, when viewed from any and all of its manifestations, it must be concluded that the 1967 Missouri Congressional Redistricting Act meets the population requirements of Article I, Section 2 of the Constitution of the United States.

**2.**

**The opinion, decision and judgment appealed from erroneously construed Article 1, Section 2, Constitution of the United States, and Wesberry v. Sanders, 376 U.S. 1 (1964), by finding that congressional districts are not as equal in population as practicable if any other plan proposed to the legislature or to the court can result in districts with smaller population variations.**

The majority opinion of the court in the case on appeal finds that the population requirements of Article I, Section 2, Constitution of the United States, have not been met in a congressional redistricting plan if the population variations between the districts are " * * * greater than those that would have been created by better plans in fact presented to but rejected by a legislature or those created by

similar plans that may be presented to a court in the trial of an apportionment case. * * * " (p. 12, Appendices to Jurisdictional Statement, 279 F.Supp. l.c. 964).

The principle in question is unequivocally adopted by the lower court following its discussion in support of the proposition that the phrase "as nearly equal as is practicable" is a precise constitutional standard. This discussion commences in Appendices to Jurisdictional Statement, Page 47 and is concluded on Page 59. The discussion is climaxed on Page 59 with the following ringing pronouncement:

> "The standard of 'as nearly as practicable' means today what it meant to Daniel Webster and has meant throughout our history. Within the context of congressional districting, if plans before the legislature or in evidence before a court establish that more equal districting was obtainable than that which was adopted, then obviously the plan enacted, on the facts, does not meet the now constitutional command that the districting be equal 'as nearly as is practicable.'" (p. 59, Appendices to Jurisdictional Statement, 279 F.Supp. l.c. 990).

The stringent requirements of such a rule are far in excess of the constitutional requirements as construed by this court in **Wesberry v. Sanders**, supra. Furthermore, the rule is in conflict with the opinions of the United States District Courts in other jurisdictions which have been affirmed by this court.

The rule of **Wesberry v. Sanders** is "* * * that as nearly as is practicable, one man's vote in a congressional election is to be worth as much as another's. * * *" The court held that the lines of congressional districts may not be drawn in such a way as to give some voters a greater voice in choosing a Congressman than others. The court recognized that it may not be possible to draw congressional districts with mathematical precision.

In **Connor v. Johnson**, 279 F.Supp. 619 (S.D. Miss.) a Congressional Redistricting Act in the State of Mississippi, which created districts with population variations slightly in excess of the population variations in the 1967 Missouri Act, was upheld by the District Court. Upon appeal to this court it was contended, among other things, that this congressional redistricting plan did not conform to constitutional standards of population equality when compared to available alternatives. It was pointed out that a plan had been proposed to the Legislature and to the court in which the population variations were cut in half as compared to the plan adopted without dividing county lines. The lower court was affirmed by this court without opinion, 386 U.S. 483.

In **Dinis v. Volpe**, Civil Action No. 66-767-G (not reported), District of Massachusetts, October 3, 1967, the court found that a Congressional Redistricting Act in the State of Massachusetts complied with the requirements of Article I, Section 2, of the Constitution. The court noted that a minority report presented a plan to the legislature which would have reduced the population variations in the districts by almost one-half. Upon appeal to this court the decision of the lower court was affirmed on January 15, 1968, Docket No. 882.

Other district courts, in opinions not passed upon by this court, have also rejected the proposition that any better plans will necessarily invalidate the work of the legislature.

In **Wells v. Rockefeller**, — F.Supp. — (S.D. N.Y., March 20, 1968), the court approved a congressional districting plan with a disparity between the most populated and least populated districts of 53,673 and in doing so observed the following:

> "Applying the formulae of permutations and combinations, a myriad of theoretical districts could be evolved.

Thus, plaintiffs urge their plan as somewhat more equal in population. Undoubtedly, others could improve on plaintiffs' plan. But under the law, the task of fixing congressional districts must be borne by the Legislature. The task of the court is to determine whether the plan offends constitutional standards. The asserted grievances of these objectants relate primarily to the manner in which the lines have been drawn in the counties and communities in which they live and where they have their political aspirations and participation. These, they imply, have been seriously interfered with by the realignment. They argue that unnatural divisions of neighborhoods result. However, wherever there is a line, there will be those who live on one side and those who live on the other. Were the lines to be drawn differently, this situation would still obtain. There would be those aggrieved by any change."

In **Exon v. Tiemann**, 279 F.Supp. 609, 612 (D. Neb. 1968), the court noted and summarized the plaintiff's contention as follows:

"Plaintiff in approaching the problem argues that the word 'practicable' should be interpreted to mean 'possible' when applied to redistricting plans. He argues that the plan which the Legislature considered most practicable would have to be the most precise plan mathematically possible and that a plan such as L.B. 1, which is not the most precise plan mathematically possible, should be held unconstitutional unless the defendants justified the deviation."

Although never specifically addressing itself to this contention, the court in sustaining the plan under review necessarily rejected it.

The Texas District Court similarly rejected the idea that better possible plans could overturn the legislative plan.

"But again we hold in fact and law that this mechanical capacity for near numerical perfection does not carry the day." Bush v. Martin, 251 F.Supp. 484, 509 (S.D. Tex. 1966).

District courts that have themselves established congressional districts with substantial (and hence literally "avoidable") population disparities between the most and least populated districts also refute the idea that better possible plans will undermine a plan under review, e.g.:

**Klahr v. Goddard,** 250 F.Supp. 537 (D. Ariz. 1966) (61,644);

**Gong v. Kirk,** 278 F.Supp. 133 (S.D. Fla. 1967) aff'd — U.S. —, 19 L.Ed.2d 784 (48,824);

**Kirby v. Illinois State Electoral Board,** 251 F.Supp. 908, (N.D. Ill. 1965) (57,046).

The United States District Court for the Southern District of Indiana only recently established congressional districts for that state resulting in a disparity between highest and lowest populated districts of 11,039, and this, in the face of an earnest dissenting opinion pointing out the possibility of achieving a disparity of only 235 (which to the dissenting judge was entirely feasible notwithstanding the rather complete fragmentation of Indiana's counties in the process) (**Grills v. Branigin,**—F.Supp.—, (S.D. Ind. Feb. 14, 1968)).

This court has never held that a congressional redistricting act is invalid if other plans which more closely approximate population equality have been presented to the legislature or to the court. The cited cases approved legislative acts under circumstances wherein other plans more closely approximating population equality had been presented to the legislature and the reviewing courts. These decisions have been affirmed by this court. Therefore, it appears that

the opinion of the court on appeal is in conflict with prior decisions of other District Court as affirmed by this court.

The practical complexities involved in the rule adopted by the lower court can lead to endless mischief. The legislative process of congressional redistricting requires the skillful compromise of a multitude of conflicting individual interests. When a legislature has reached the end of the rope in an apportionment tug-of-war and compromise approximating population equality is being finalized, the entire legislative deliberation can be thrown askew if a plan that is slightly better in the terms of population equality is presented as an eleventh-hour proposal. If a legislature adopted the best congressional redistricting plan in terms of population equality among the districts that had been proposed to it, the governor would be under obligation to veto the plan if a better plan in terms of population equality among the districts was proposed to him before such legislation became law by his signature. Even if no better plan in terms of population equality is suggested to the legislature, an adopted plan is subject to being voided in a subsequent court proceeding in which a slightly better plan may be proposed. Appellants find nothing in the prior decisions of this court or in the prior decisions of any other lower court which suggest that the validity of a congressional redistricting plan may be void if any mathematical improvement in the population of the districts can be demonstrated.

3.

**The opinion, decision and judgment appealed from erroneously construed Article I, Section 2, Constitution of the United States, and prior decisions of this court by holding that population variations between congressional districts which are de minimis are constitutionally impermissible; and by holding that minor variations in the population of the congressional districts are constitutionally impermis-**

sible in the absence of competent and substantial evidence justifying the variations.

The majority opinion of the court in the case on appeal rejects the principle that population variations between congressional districts which are de minimis are constitutionally permissible and the court further finds that minor variations in the population of congressional districts are constitutionally impermissible in the absence of competent and substantial evidence justifying the variations. These stringent principles adopted by the court are in excess of any prior lower court decision or any prior decision by this court. The excessiveness of these principles adopted by the lower court is in conflict, either expressly or impliedly, with **Wesberry v. Sanders**, supra; **Reynolds v. Sims**, 377 U.S. 533 (1964); **Swann v. Adams**, 385 U.S. 440 (1967); **Kilgarlin v. Hill**, 386 U.S. 120 (1967); **Preisler v. Secretary of State of Missouri**, 257 F.Supp. 953, (W.D.Mo. 1966) aff'd. sub nom. **Kirkpatrick v. Preisler**, 385 U.S. 450 (1967); **Connor v. Johnson**, supra; **Dinis v. Volpe**, supra; and a multitude of District Court decisions from jurisdictions all over the United States constituting most if not all of the congressional redistricting cases decided since the decision in this court's landmark case, **Wesberry v. Sanders**.

**Wesberry v. Sanders** recognizes that it may not be possible to draw congressional districts with mathematical precision. **Reynolds v. Sims** teaches that mathematical nicety is not a constitutional requisite and that mathematical exactness or precision is hardly a workable constitutional requirement. **Swann v. Adams** declares, 385 U.S. l.c. 444:

> "• • • De minimis deviations are unavoidable, but variations of 30% among senate districts and 40% among house districts can hardly be deemed de minimis and none of our cases suggests that differences of this

magnitude will be approved with a satisfactory explanation grounded on acceptable state policy. * * * "

**Preisler v. Secretary of State** (authorized by the same judicial writer who prepared the opinion in the case at Bar) recognizes that the doctrine of de minimis is applicable to population variations between congressional districts as follows (257 F.Supp. l.c. 973):

> "* * * Use of such words as 'feasible' and 'practicable' in a careful statement of the fundamental constitutional principle constitutes but a recognition that the familiar doctrine of **de minimis** is applicable and is designed to make clear that a State legislature would not be expected to create entirely new political subdivision lines in order to have absolute and precise mathematical equality in its congressional districts."

**Kilgarlin v. Hill** rejects the constitutional validity of population variances of the size and significance before the court in that case (14.84% in excess and 11.64% below a mathematically ideal district). **Dinis v. Volpe** finds that the deviations from mathematical perfection in the Massachusetts Congressional Redistricting Act are obviously de minimis. **Connor v. Johnson,** gives implicit recognition to the doctrine of de minimis by finding that the population variations of congressional districts in the Act reviewed by the court (variations in excess of those found in the Missouri Act) reflect districts substantially equal in population. All of the principles cited in this paragraph have been expressly declared by this court or declared by lower court decisions which have been affirmed by this court.

Other decisions from the United States District Courts have recognized and followed the doctrine of de minimis in congressional redistricting cases either expressly or impliedly. One of the most recent expressions of the doctrine is found in **Exon v. Tiemann,** 279 F.Supp. l.c. 612:

"[2] We believe that all that is required under the teachings of the United States Supreme Court cases dealing with congressional redistricting is that the variances be slight and justifiable. If the variances are slight, that in itself may be a justification for any plan that has not been reached by improper motive.

Based upon the 1967 projections, the largest district is .74% above median; the smallest district is .46% below the median. The remaining district is but .28% below the median.

[3] Based on the 1966 Bureau of Business Research figures, the largest district is 1.44% above the median and the smallest district 2.09% below the median. The remaining district is approximately .66% above the median. We regard these variances as slight under the evidence before us. We conclude that the de minimis doctrine applies and that its application is not limited to situations where the most nearly mathematically exact districts have been created and the question is whether the disparity between such districts is de minimis. We conclude that if the disparity is de minimis that the courts, applying the 'rule of reason' should approve an enactment such as L.B. 1 where the Legislature has properly maintained the integrity of political subdivisions and has recognized natural or historical boundary lines or similar considerations in giving final approval to its enactment, and has not been influenced by improper motive."

The fundamental principle of the system of representative government in this country requires that the goal in establishing congressional districts is to provide a near equal voice to each individual in the election of representatives. This ultimate goal cannot be reached but the Constitution requires that the end result of efforts in pursuit of the

goal be that one man's vote shall as nearly as is practicable be worth as much as another's. The failure of perfection in pursuit of this goal is evident from the assignment of the number of members of Congress to the several states. Under this complicated process the State of New Hampshire with two members of Congress assigned could elect Congressmen from mathematically ideal districts composed of 303,461 people. At the other end of the pole the State of Maine with two Congresmen assigned could elect members of Congress from mathematically ideal districts composed of 484,633 people. Mathematically ideal districts in the remainder of the states which elect more than one Congressman run the scale between these two extremes. (In passing, it is interesting to note that congressional districts in the State of Maine vary in population by 8.60% and congressional districts in the State of New Hamprhire vary by 18.68%). Thus, the fundamental goal of one-man one-vote is impossible of achievement in electing members of Congress throughout the 50 states.

Appellants do not intend to suggest that the variations in hypothetically ideal districts among the several states from 303,461 to 484,633 should permit individual states to establish congressional ditricts with substantial and significant population variations. Appellants support wholeheartedly the one-man one-vote principle and its application to congressional redistricting plans as a necessary and desirable foundation block in our cherished system of representative government. However, appellants insist that common sense dictates, and the concept of practicable anticipates, a zone or reasonableness in the variation of populations among congressional districts which may be said to meet the requirements of Article I, Section 2, of the Constitution, without further explanation. Population variations within this zone of reasonableness are de minimis.

Appellants are supported in rationale of the previous two paragraphs by the court's commentary in **Exon v. Tiemann**, 279 F.Supp. l.c. 612, as follows:

> "In apportioning the 435 Representatives in the Congress to the States, the basis was one Representative for each 410,481 of population. Nebraska, with a population of 1,411,330, was apportioned three Representatives. The Nation's population in 1960 was 179,323,175. Thus, in Nebraska, there are 179,887 people, or 12.7% of its population who, it could be argued, are not fully represented in the Congress, though they receive the representation the Constitution provides. "Mention is made of these variations, not that we would justify variations in Congressional Districts of 12.7% but because we believe that in determining what is **de minimis**, and in applying that doctrine and measuring it against the principle of one person, one vote, we must recognize that the states do not and can not have exact mathematical representation in the Congress. For a court to demand of a legislative body fixing Congressional District boundaries under such circumstances, complete mechanical exactness is unrealistic."

(By the same reasoning, there are 215,003 people in Missouri that are unrepresented.)

Appellants presented to the lower court a table of the several states reflecting current congressional districts in the order that the largest and smallest district in such states vary in per cent of population from the smallest deviation to the largest deviation. Appellants have continued to bring this table up-to-date as changes occur concerning congressional districts throughout the country and there follows such a table with data as current as appellants have been able to make at this writing.

| State & Cong. Dists. | Ideal Size | Largest | Deviation From Avg. Largest | Smallest | Deviation From Avg. Smallest | Total % of Deviation |
|---|---|---|---|---|---|---|
| Ark(4)* | 446,568 | 453,567 | + 1.57 | 443,892 | — .60% | 2.17 |
| Ohio(24)* | 404,433 | 409,939 | + 1.36 | 400,058 | — 1.08% | 2.44 |
| Mass(12)** | 429,048 | 433,240 | + .97 | 424,524 | — 1.05% | 2.02 |
| Md(8)** | 387,586 | 393,210 | + 1.45 | 383,237 | — 1.12% | 2.57 |
| Ind(11)** | 423,863 | 428,197 | + 1.02% | 417,158 | — 1.58% | 2.60 |
| Utah(2)** | 445,319 | 451,864 | + 1.47% | 438,763 | — 1.47% | 2.94 |
| Mich(19)* | 411,747 | 417,026 | + 1.28% | 403,263 | — 2.06% | 3.34 |
| Okla(6)* | 388,047 | 396,161 | + 2.09% | 380,734 | — 1.88% | 3.97 |
| N.C.(11)** | 414,196 | 423,750 | + 2.31% | 406,474 | — 1.86% | 4.17 |
| Tenn(9)** | 396,343 | 404,968 | + 2.176% | 388,240 | — 2.044% | 4.22 |
| Mo(10) | 431,961 | 445,523 | + 3.13% | 419,721 | — 2.83% | 5.96 |
| Miss(5)** | 435,628 | 449,565 | + 3.19% | 423,300 | — 2.83% | 6.02 |
| Mont(2)** | 337,384 | 347,701 | + 3.08% | 327,066 | — 3.08% | 6.16 |
| Wisc(10)* | 395,178 | 408,677 | + 3.42% | 382,818 | — 3.20% | 6.62 |
| S.D.(2)*** | 340,257 | 351,901 | + 3.42% | 328,613 | — 3.42% | 6.84 |
| Me(2)*** | 484,633 | 505,435 | + 4.30% | 463,800 | — 4.30% | 8.60 |
| Ky(7)* | 434,022 | 457,688 | + 5.45% | 417,544 | — 3.80% | 9.25 |
| N.D.(2) | 316,223 | 333,290 | + 5.40% | 299,156 | — 5.40% | 10.80 |
| Va(10)* | 396,695 | 419,642 | + 5.78% | 377,511 | — 5.08% | 10.86 |
| S.C.(6)* | 397,099 | 421,478 | + 6.14% | 375,576 | — 5.42% | 11.56 |
| Ariz(3)* | 434,054 | 456,529 | + 5.18% | 405,217 | — 6.64% | 11.82 |
| Fla(12)** | 412,630 | 448,885 | + 8.78% | 400,061 | — 3.05% | 11.83 |
| # | | (415,704) | (+ .74%) | (407,677) | (— 1.20%) | ( 1.94) |
| N.Y.(41)* | 409,324 | 435,880 | + 6.48% | 382,277 | — 6.60% | 13.08 |
| Calif(38)* | 413,611 | 446,974 | + 8.1 % | 392,756 | — 5.0 % | 13.1 |
| Ala(8)** | 408,343 | 438,130 | + 7.3 % | 383,625 | — 6.10% | 13.40 |
| Ill(24)** | 420.048 | 451,527 | + 7.45% | 394,481 | — 6.1 % | 13.6 |
| R.I.(2)*** | 429,744 | 459,706 | + 6.97% | 399,782 | — 6.97% | 13.94 |
| Ore(4)*** | 442,172 | 468,809 | + 6.02% | 404,165 | — 8.60% | 14.62 |
| Kans(5)** | 435,722 | 459,063 | + 5.36% | 394,056 | — 9.56% | 14.92 |
| # | (436,107) | (442,677) | (+ 1.51%) | (427,617) | (— 1.95%) | ( 3.46) |
| Tex(23)* | 416,506 | 450,353 | + 8.1 % | 387,794 | — 7.1 % | 15.2 |
| N.J.(15)** | 404,452 | 439,756 | + 8.73% | 374,996 | — 7.28% | 16.01 |
| Conn(6)* | 422,539 | 482,135 | +14.10% | 404,201 | — 4.34% | 18.44 |
| N.H.(2)** | 303,561 | 331,818 | + 9.34% | 275,103 | — 9.34% | 18.68 |
| Idaho(2) | 333,596 | 364,984 | + 9.41% | 302,207 | — 9.41% | 18.82 |
| Neb(3)* | 470,443 | 507,330 | + 7.84 | 414,807 | —11.8 % | 19.64 |
| # | (512,446) | (512,446) | + 6.48 | (382,277) | — 2.09% | ( 3.53) |
| Colo(4)* | 438,488 | 493,887 | +12.63 | 405,899 | — 7.43% | 20.06 |

| State & Cong. Dists. | Ideal Size | Largest | Deviation From Avg. Largest | Smallest | Deviation From Avg. Smallest | Total % of Deviation |
|---|---|---|---|---|---|---|
| La(8) | 407,128 | 462,753 | +12.03 | 370,131 | — 9.09% | 21.12 |
| Wash(7)*** | 407,602 | 444,857 | + 8.38 | 353,158 | —13.36% | 21.74 |
| Iowa(7)* | 393,934 | 442,406 | +12.30% | 353,156 | —10.35% | 22.65 |
| Minn(8)* | 426,733 | 482,872 | +13.16% | 375,475 | —12.01% | 25.17 |
| Pa(27)* | 419,236 | 482,201 | +15.02% | 356,821 | —14.89% | 29.91 |
| Ga(10)* | 394,312 | 455,575 | +15.54% | 329,738 | —16.38% | 31.92 |
| W.Va(5)* | 372,064 | 422,046 | +13.43% | 303,098 | —18.54% | 31.97 |

# Parenthesized data based on other than 1960 Federal Census
* Data verified by office of State's Attorney General, October, 1967
** Data verified by court opinion
*** Data obtained from
Congressional Quarterly Weekly Report, Sept. 16, 1966
National Municipal League. Apportionment in the 1960's August 1967
U.S. Senate. Report No. 291. 90th Congress, 1st Session June 1, 1967

This table reflects the changes which have been made in the several states is applying the one-man one-vote principle to congressional districts pursuant to **Wesberry v. Sanders,** supra. Appellants contend that the table reflects the results of the application of the doctrine of deminimis to population variations is congressional districts. Appellants recognize that population variations among congressional districts in one state which have been found to meet the requirements of the Constitution do not necessarily support constitutional validity of similar population variations in another state. However, the court recognized the validity of such comparisons in **Dirds v. Volpe**, 264 F.Supp. l.c. 429, as follows:

> "[4] While staying within mathematical limits judicially approved in comparable congressional districting cases is not necessarily to stay within constitutional bounds for the reason, as we have already pointed out, that apportionment cases are not to be decided by application of any mathematical formula but must be solved by the test of practicability with reference to

the specific situation present in the state involved, nevertheless deviations from the ideal quotient judicially disapproved in other cases do give some indication of the limits of constitutional departure from numerical equality. * * *'' See also **Exon v. Tiemann**, supra.

The court unfairly and unjustifiably rejected appellants' table comparing Missouri with other states in the matter of current congressional district statistics. The court apparently discarded this table because the court believed that the expression of the total percentage deviation from the ideal should be expressed in some other manner than in the mere addition to the highest and lowest percentage figures. The court chose to disregard the only purpose of this particular mathematical device, that being only a means of conveniently arranging the various states in a logical sequence. For its intended purpose the method was not inaccurate, and for the court to conclude from this single factor that the entire able was inaccurate, and thus unworthy of any consideration, was improper.

This exact identical mathematical expression has been used by the following eminent authorities: **Moore v. Moore**, 246 F.Supp. 578, l.c. 580 (SD Alabama 1964), **Bush v. Martin**, 251 F.Supp. 484, l.c. 489 (SD Tex. 1966), **Grills v. Branigin**, 255 F.Supp. 155, l.c. 157-158 (SD Indiana 1966), **Wells v. Rockefeller**, 273 F.Supp. 984, l.c. 966 (S.D. NY 1967) **Gong v. Kirk**, 278 F.Supp. 133, l.c. 134, 135 (SD Florida 1967).

One of the sources for the table cited by appellants was the Congressional Quarterly Weekly Report of September 16, 1966. The court comments that he has examined the source at page 814 and found that it did not agree with any of the figures on appellant's table. The Congressional Quarterly for September 16, 1966 does not have a page 814. There is a page 814 in the Congressional Quarterly for April 15, 1966 which does tabulate statistics in regard to

congressional districts. Therefore it is obvious that the lower court has condemned appellants of inaccuracy by reason of examining the wrong source, a source not used by appellants (279 F.Supp l.c. 991, pages 10 and 11 Footnotes to Appendices to Jurisdictional Statement). Furthermore the court did not even properly interpret the wrong source which it would examine. The court should have noted that the table examined in the wrong source did not attempt to list the total variation from highest district to lowest district as did appellant's table, but merely listed the "Maximum Variations" in only a single direction from the ideal.

Appellants are baffled at the court's implication that none of the figures on the table agree with sources cited by appellants. The principal source of the table was the publication by the National Municipal League in August 1967, entitled Apportionment in the 1960's. The information was made current by the other sources cited. In spite of the contempt expressed by the court, appellants firmly stand upon the accuracy of the table.

The court also rejects appellant's comparative table as a matter of law based upon **Davis v. Mann**, 377 U.S., l.c. 682. An examination of the authority cited by the court reveals merely a summary of the evidence presented in the lower court to have included "results of a comparative study of legislative reapportionment [showing] Virginia as ranking eighth among the states in population-based legislative representativeness as reapportioned in 1962." l.c. 682. The opinion of this court nowhere addresses itself to the validity of such evidence and therefore the lower court's statement that this court had therein" * * * rejected defendant's attempted justification based on that sort of comparative data." is not sustained by **Davis v. Mann** (Pages 60 and 63 Appendices to Jurisdictional Statements, 279 F.Supp., l.c. 991, 993).

The lower court further relies on **Swann v. Adams** before this court as authority for rejection of appellant's comparative table. The citation from **Swann v. Adams** must be considered in its context and must be quoted in full (which the lower court failed to do). The complete statement by this court is as follows:

> "In any event, the fact that a 10% or 15% variation from the norm is approved in one State has little bearing on the validity of a similar variation in another State. 'What is marginally permissible in one State may be unsatisfactory in another, depending upon the particular circumstances of the case.' Reynolds v. Sims, 377 U.S. 533, 553, 578, 12 L.Ed.2d 506, 522, 536, 84 S.Ct. 1362."

It is obvious that the 10 or 15% variation from the norm which the court was considering in **Swann v. Adams** could not form the basis for a comparison of variations in the area of de minimis. It is further obvious that **Swann v. Adams** and **Reynolds v. Sims** were referring to substantial population variations which might be marginally permissible on the basis of other justifications. Appellants on the other hand are demonstrating to the court that certain population variations are de minimis or minor and constitutionally permissible per se. A comparison of how Missouri stands in relation to the several states in view of the multitude of congressional redistricting plans which have been adopted subsequent to **Wesberry v. Sanders** is relevant to the question of de minimis.

**4.**

**The opinion, decision and judgment appealed from is erroneous and in conflict with prior decisions of this court in holding that in establishing congressional districts no allowance can be made for legislative interplay and that any population deviations from absolute mathematical**

**equality between congressional districts attributable to political compromise within the state legislature is arbitrary and discriminatory and invalidates such legislation. The opinion renders nugatory considerations other than population which may be recognized by the legislature in drawing congressional districts as provided by prior decisions of this court.**

The legitimacy of legislative interplay in the enactment of any legislation including congressional redistricting has been discussed at length under the first argument of this brief. In that discussion cases from the United States District Courts in New York, Nebraska, Kansas, North Carolina, Texas and Mississippi were cited in which recognition and approval of the complicated and tedious legislative process was expressed.

**Connor v. Johnson**, supra, which is one of the cases referred to above, was affirmed by this court. Although this court has not expressly alluded to legislative interplay as one of the considerations to be taken into account in judging the constitutional validity of congressional redistricting, it is clear from the opinions of this court that judgment must be exercised in contemplation of all legitimate considerations.

In **Reynolds v. Sims**, supra, and **Swann v. Adams**, supra, this court established, as a guideline to be applied in redistricting cases, the principle that minor population variations which are based upon legitimate considerations incident to the effectuation of a rational policy are permissible. Among the legislative considerations enumerated by this court are the integrity of political subdivisions, the maintainance of compactness and contiguity in legislative districts and the recognition of natural or historical boundary lines. Furthermore in **Reynolds v. Sims**, supra, the court commented with approval on the legislative nature of con-

gressional redistricting. Therefore, it appears to appellants that this court has given implied recognition and approval to legislative interplay as a legitimate consideration in legislative redistricting matters.

5.

**The opinion, decision and judgment appealed from is based upon conclusions which result from a multitude of inaccuracies, irrelevancies and distortions in the findings of fact. For example: the court erroneosuly found that the Missouri Legislature at no time considered accurate 1960 census figures; the court erroneously found that "better plans were in fact presented to but rejected by Missouri legislators"; the court distorted the testimony of legislative leaders; the court relied upon post-hearing information from unknown sources to discredit appellant's evidence in regard to areas of the state with growing population; the court erroneously assumes that rural voters and urban voters must be segregated in congressional districting; and many more.**

The opinion, decision and judgment appealed from is so fraught with distortions, inaccuracies and irrelevancies that its decision should not stand. These inaccuracies arise continually throughout the opinion and throughout the Findings of Fact. Some of the conclusions are necessarily erroneous being based upon factual inaccuracies. It is difficult to classify or pinpoint these inaccuracies into groups for the purpose of overcoming erroneous conclusions. However, a discussion of these inaccuracies follows for the purpose of demonstrating the seriousness of such erroneous fact finding.

1. The lower court found that the General Assembly at no time ever considered accurate 1960 census population figures in its consideration of the 1967 Act (p. 4, Appendices to Jurisdictional Statement, 279 F.Supp. l.c. 957). The State-

ment of Facts to this brief sets out clearly that the General Assembly considered accurate 1960 census population figures throughout its deliberations in regard to the 1967 Act and that inaccuracies in calculations arose during the last few days prior to final enactment. No further discussion of the court's inaccurate finding in this regard appears necessary.

2. The majority opinion of the lower court finds that "better plans were in fact presented to but rejected by (the 1967) Missouri legislators." This finding by the court is one of the principle foundation blocks upon which it bases its conclusion that the congressional districts in the enacted plan are not as nearly equal in population as practicable. This conclusion by the court is based upon fallacious findings of fact.

The court comments at length upon House Bill No. 870 as being a better plan than the enacted plan. In the words of the court this plan "* * * provided districts that vary substantially less from the ideal than any bill ever before proposed by any Missouri legislature. * * *" In reaching its conclusion the court calculated the population of the various districts proposed by House Bill No. 870. In doing so the court lumped the entire population of the area encompassed by proposed Districts 1, 2, 3, and 9 into one population total. This population total was divided by 4 and equal populations of 431,896 were assigned to these 4 districts. **These district populations bear no relationship what so ever to the populations actually present within these individual 4 districts.** A conclusion that House Bill No. 870 was a better plan from the one-man one-vote concept based upon such a factual premises is entirely fallacious.

Appellants have not calculated the populations of the 4 districts in question. Furthermore, it does not appear that the sponsors of the bill made any attempt to calculate the

populations of these districts. The proposed bill utilized 1960 ward and precinct boundaries in the City of St. Louis and 1965 township and precinct boundaries in St. Louis County. Relating 1960 census data to the boundaries described in the proposed bill make it difficult, if not impossible, to compute the population totals of the districts. Any accurate computation of the population of these districts should be made by the experts at the Bureau of Census.

If it is valid to calculate the populations for congressional districts as done by the court for the 4 districts in question, it is equally valid to take the entire geographical area of the State of Missouri with its total population, divide by 10, place 10 abstract stars on a map of the State of Missouri and conclude that 10 perfect congressional districts have been established in so far as population is concerned. **Reductio ad Absurdum!**

In finding that better plans than the enacted plan were available to the legislature the court referred to its opinion in the prior case, **Preisler, et al. v. Secretary of State,** at 257 F.Supp. l.c. 964, in which the court commented upon the Senate Committee Substitute for Senate Bill No. 302[320] which had been proposed to the 1965 legislature. An examination of this proposed Bill reflects that the court inaccurately calculated the population of the 6th district at 442,253, whereas the correct census population of that proposed district, which consisted of entire counties and is thus calculated by simple arithmetic, was 444,252. The low district of that plan was No. 7, with a population of 417,399 as recognized by the court. Thus, the population variation between these two proposed districts was 26,853, which is in excess of the population variations between the largest and smallest districts of the 1967 Act. This inaccurate finding is made by the court at page 14, Appendices to Jurisdictional Statement, 279 F.Supp. l.c. 965.

The court repeatedly engages in redistricting dominoes and by moving one domino the inference is left that an overall congressional redistricting plan would result which was a "better plan" in that population variations between the largest and smallest district would be less than such variations in the enacted bill. On page 21 Appendices to Jurisdictional Statement, 279 F.Sunpp. l.c. 974, the court finds that House Committee Substitute for Senate Committee Substitute for Senate Bill 182 proposed to and rejected by the General Assembly was a better plan. It is true that the court's dominoe game with the plan would have improved the proposed equality in some of the districts. However the overall variance between the largest and smallest district would have been 26,065 or slightly more than the 1967 act. In this discredited plan, which was emphasized by the court, the court found that district 10 would have had a population of 1,064 in excess of an ideal district. In fact the proposed district 10 in this discredited plan would have had a population of 12,409 in excess of an ideal district. This was brought to the specific attention of the judicial author of the opinion of the lower court upon his own interrogation of the Majority Leader of the lower House (A. 69, 70).

On pages 23 through 25, Appendices to Jurisdictional Statement, 279 F.Supp. 971, the court comments upon Senate Bill 182 and leaves the clear implication that this bill was a better plan than the enacted bill. An analysis of this bill reflects that the population variation between the largest and smallest district was 25,721, a variation almost identical with that which resulted with the enacted bill.

3. A disortion of the facts was made by the court on page 25 and 26 of Appendices to Jurisdictional Statement, 279 F.Supp., l.c. 971. The Eighth District is the largest district in the 1967 act with a population of 13,542 in excess of an ideal district. The court proposes to improve the

population inequality of this district by shifting Howard County with a population of 10,989 to the district and eliminating from the district St. Louis County population of 88,659 (A. 6). The result of this judicial "improvement" would be an Eighth District with a population of 366,723 or thus this "improved" rural district would have a population of 65,258 below an ideal average district. As nearly equal as practicable!

The court creates three new districts for the City of St. Louis and St. Louis County at pages 27 and 28, Appendices to Jurisdictional Statement, 279 F.Supp. l.c. 972, 973. The remaining St. Louis County population after the creation of these population districts would be 155,315. The court stops his redistricting game at this point with the bland statement that this population of 155,315 could be taken into an adjoining out state district. The only adjoining out state district is the 9th with a population of 428,223.

Appellants note that two of these townships, Spanish Lake and Florissant, were the areas of St. Louis County that were in fact placed in the northeast Missouri 9th congressional district by the 1967 Missouri Legislature, but the two other court-neglected townships, Ferguson and Airport, with a population of 102,709, could hardly be added to the 9th district, when such district had a population in the enacted bill of 428,223, nor could these two townships be placed in any other "out state" district because they are geographically separated from all other such districts by the court's 3rd "perfect" St. Louis area congressional district (See maps at p. 131 and p. 154 of Appendix).

Obviously the wholesale shuffling of rural counties to accommodate the court's St. Louis plan would constitute an entire congressional redistricting checkers game.

4. The court at pages 37 and 38, Appendices to Juris-

dictional Statement, 279 F.Supp. l.c. 978, finds that the population variation between the largest district, No. 8, and every other district except No. 5, exceeds 16,000 people. This finding is wholly inaccurate. Simple arithmetic discloses that District 8 exceeds the population of the remaining districts as follows:

No. 1— 5,777
No. 2— 9,075
No. 3— 9,424
No. 5—14,345
No. 7— 8,754
No. 4—25,802
No. 6—23,285
No. 9—17,300
No. 10— 2,655

Thus, it is clear that District 8 does not exceed five of the remaining districts by a population of 16,000, and in most instances the population is far less than 16,000.

5. The court recognized the direction of Article III, Section 45, of the Missouri Constitution, that congressional districts should be as compact as may be. Appellants have contended that compactness was one of the significant considerations of the General Assembly in formulating the 1967 Act. The majority opinion proposes the shifting of various counties for the purpose of achieving greater population equality. It can be demonstrated that the shifts proposed will in every instance cause compactness to suffer. There follows a map of the State of Missouri reflecting the congressional districts as composed in the 1967 Act. Counties which the court proposed to shift into other districts have been shaded. Thus, Schuyler County will become a part of District 6 (Appendices to Jurisdictional Statement, pp. 23,

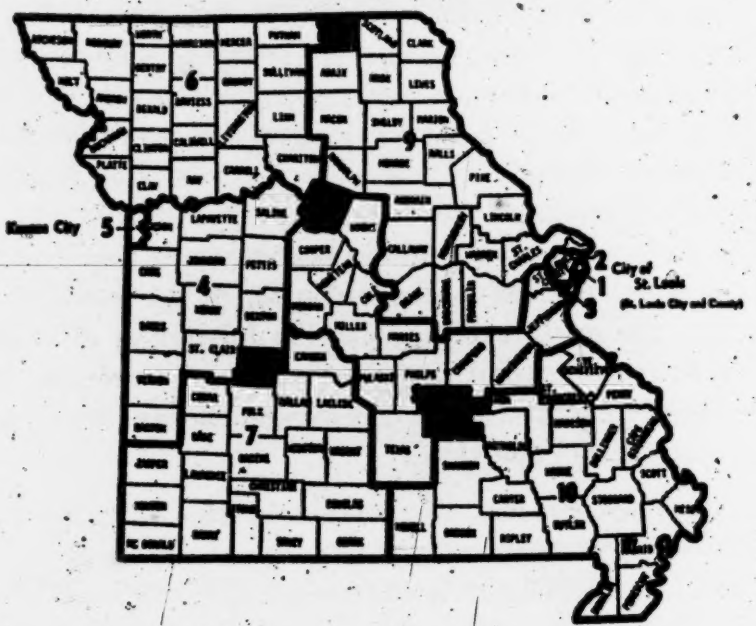
24; 279 F.Supp. l.c. 970). Howard County and Hickory County would become a part of District 4 (Appendices to Jurisdictional Statement, pp. 24, 25, 30; 279 F.Supp. l.c. 971, 974). Dent County would become a part of District 10 (Appendices to Jurisdictional Statement, p. 31, 98; 279 F.Supp. l.c. 974, 1004). It is clear from the map that compactness would suffer by such changes. Perhaps the most startling example of ignoring compactness would be the attachment of Howard County as sort of a stubby handle to District 4. The population improvements resulting from the shifting of such counties would not approach mathematical exactness as reflected by the tabulation of the resulting districts on the map, together with the tabulation of existing districts. It is apparent that the variation between the largest and the smallest district (the 1st and the 9th) would be in excess of 16,000 population.

Other "better plans" demonstrated a lack of judicial consideration to compactness. For example, Map 1, p. 39, Appendices to Jurisdictional Statement, 279 F.Supp. l.c. 979, creates an 8th district with Texas County as a stubby handle. Map 2, p. 40, Appendices to Jurisdictional Statement, 279, F.Supp. l.c. 980, creates a river district of a string of counties following the Mississippi River two-thirds of the length of the State of Missouri.

The Ten
**CONGRESSIONAL DISTRICTS**
of Missouri

(As Redrawn By The 74th General Assembly - 1967)

MISSOURI STATE CHAMBER OF COMMERCE




## DISTRICT POPULATIONS

| | Judicially Proposed Districts | Enacted Districts |
|---|---|---|
| 1st | 439,746 | 439,746 |
| 2nd | 436,448 | 436,448 |
| 3rd | 436,099 | 436,099 |
| 4th | 435,096 | 419,721 |
| 5th | 431,178 | 431,178 |
| 6th | 427,290 | 422,238 |
| 7th | 432,613 | 436,769 |
| 8th | 424,219 | 445,523 |
| 9th | 423,171 | 428,223 |
| 10th | 434,311 | 423,868 |

6. Distortions of testimony by the majority opinion influenced erroneous conclusions.

In appraising the testimony of legislative leaders the court concluded that the standard followed by the Missouri Legislature was "* * * how much variance can we expect to get away with. * * *" In reaching this conclusion the court alluded to the testimony of Senator Avery, the author of Senate Bill 182. The court quotes his testimony to the effect that the "* * * Missouri legislature could comply with the 'as nearly as is practicable' standard of Wesberry v. Sanders by getting within 2% of the equality demanded by Article I, Section 2." When Senator Avery's testimony is viewed in its context, it becomes apparent that the witness, while recognizing that perfect population equality had not been achieved, considered variances of "a little over 2% under" and "approximately 2% over" for the two particular districts about which the witness was testifying to be not unreasonable in the light of other considerations. The other considerations to which the witness was referring were compactness, as required by the state Constitution, and the integrity of county lines.

The court makes a distortion of another witness's testimony by editing the testimony so as to make it appear that the witness believed the 1967 Missouri General Assembly had rejected "* * * a better bill, a stronger bill * * *" in terms of closer equality in population. This witness, the Minority Leader of the House of Representatives, made the statement referred to in quotes in regard to the political composition of the proposed districts in a Bill which had been rejected by the Legislature. It is quite clear that the witness considered the rejected Bill to be "* * * a better bill; a stronger bill * * *" insofar as his political party was concerned rather than insofar as population equality is concerned.

7. Appellants submitted testimony by legislative leaders to show that the General Assembly in establishing the 4th and 6th districts as districts with a population of less than the ideal average, took into consideration that these districts include areas of rapid population growth since 1960. The court refutes this testimony by going outside the record and reaching population projections allegedly received from the Missouri Division of Health and the University of Missouri's College of Agriculture (pp. 42-44, Appendices to Jurisdictional Statement; 279 F.Supp. l.c. 982-983). The judicial impropriety of the court in gathering ex parte and post-hearing evidence on its own to refute testimony received before the court is so patently obvious as to require no further comment.

Furthermore, appellants to this day are unaware of the sources used by the court. Appellants do not know whether this information came to the court by way of publications, by way of telephone conversations, by way of heads of departments, clerks or janitors in these departments, etc. Appellants, therefore, can place no reliance whatsoever on the accuracy of these projections.

8. In a footnote at this point (p. 9, footnotes to Appendices of Jurisdictional Statement; 279 F.Supp. l.c. 970) the court lambasted the idea that the 1967 Missouri Legislature was justified in taking cognizance of population trends in establishing congressional districts. Particular reference was made to the evidence that in establishing the 6th congressional district the Missouri Legislature considered that this was a rapidly growing district in terms of population since the 1960 census and therefore, this district could be so drawn as to have less apparent population than the ideal average based on the 1960 census. The court proceeded to demonstrate that the legislature's logic was unfounded in fact by subtracting all areas of the 6th district lying within

the corporate limits of Kansas City to reach the conclusion that the 6th district had a net population loss of some 28,424 from 1950 to 1960. Apart from what appellants feel to be the irrelevancies of this footnoted argument by the court, which is the court's idea that rural favoritism and urban discrimination was again at work, the proposition fails because regardless of the composition of the 6th district as established by the 1967 Missouri Legislature, (whether it contained rural areas only or a combination of rural and urban, which it admittedly did) the district as considered by the legislature must be taken as a whole, and not divided; as the court did, into areas of growing population and areas of declining population. Thus, taking and using the court's own figures in the footnote, the 6th congressional district as established by the 1967 Missouri Legislature had a net population increase from 1950 to 1960 of 10,306. The court was in error; the correct figure is 14,571. If the court chooses to discuss an animal, it cannot sever parts of its body and thereafter treat the creature as though no amputation had occurred! Appellants cannot leave unnoticed certain inaccurate figures in this same footnote. The court states there was a net population loss of 40,467 in those counties of the 6th district that declined in population from 1950 to 1960. The actual loss for those counties was 36,202. The court also states that three counties in the district had population gains for the period of 50,773, to which appellants agree, but that only 12,043 of this was in areas outside the corporate limits of Kansas City. The court is thereby stating that 38,730 of the gain was in Kansas City. That part of Kansas City in Clay County admittedly increased 21,371 from 1950 to 1960. (U.S. Census of Population, 1960, Mo., Number of Inhabitants, PC(1) 27 A Mo. p. 27-16). But Platte County, the only other county of the 6th district wherein Kansas City lies, itself increased only 8,377 from 1950 to 1960 (Ibid., p. 27-21). Obviously, substantially more than

12,043 of the decennial gain for the three counties lay outside of Kansas City!

9. The lower court's frequent remonstrance of the Missouri legislature for favoring rural voters at the expense of their city cousins is not, and cannot be based upon a conclusion that rural districts are substantially under-populated and urban districts substantially over-populated by the 1967 Act. Witness the following tables:

**ENTIRELY URBANIZED DISTRICTS**

(Bureau of Census Standard Metropolitan Statistical Areas, P. 27-2, U.S. Census of Population: No. of Inhabitants, Mo., Final Report PC(1)-27A, U.S. Government Printing Office.)

1st—439,746
2nd—436,448
3rd—436,099
5th—431,178

Average Population 435,868 (Ideal 431,981)

**PREDOMINANTLY RURAL DISTRICTS**

4th—419,721*
6th—422,238**
7th—436,769***
8th—445,523****
9th—428,223*****
10th—423,868

Average population—429,390 (Ideal 431,981)

* Contains 40,292 in Kansas City and 151,721 in Jackson County, Bureau of the Census Standard Metropolitan Statistical Areas

** Contains Clay County population 87,474 and Buchanan County, population 90,581, Bureau of the Census Standard Metropolitan Statistical Areas

*** Contains Greene County, population 126,276, Bureau of the Census Standard Metropolitan Statistical Area

**** Contains 88,659 in St. Louis County, and Jefferson County, population 66,377, Bureau of the Census Standard Metropolitan Statistical Areas

***** Contains 53,606 in St. Louis County and St. Charles County population 52,970, Bureau of the Census Standard Metropolitan Statistical Areas.

The lower Court's real complaint is for the violation of a constitutional standard apparently of its own creation, which is the right of urban voters to be cast insofar as possible into urban districts, and presumably, the comparable right of rural voters to be placed as nearly as possible in rural districts.

10. The court points out the simplicity of achieving "* * * exceedingly close to equal populations for adjoining districts * * *" because of the "* * * ability to shift precincts from one side of a district dividing line to the other * * *" (p. 7, Appendices to Jurisdictional Statement, 279 F.Supp. l.c. 972). The court notes in this regard that such was done in the Jackson-Clay County apportionments and directs attention to its previous reference to these apportionments in its own earlier congressional districting opinion (257 F.Supp. at 978, footnote 16). The reference therein is to cases with the style **Davis, et al. v. Curry, et al.**, No. 15745-1 and **Wnuk, et al. v. Bywaters, et al.**, No. 15902-2 (Unreported) which the court claims in the earlier opinion at 257 F.Supp. 978, Footnote 16, voluntarily resulted in "two representative districts that varied only 792 population from ideal average districts of 330,000 population" in Jackson County and a "deviation of only 166 from an ideal district of 43,237" in Clay County. Jackson County's 1960 population of 622,732 divided by two is 311,366, making it evident that the court's "ideal average" is an approximation. One wonders if what appears to be the precise variation figure of 792 in anyway approaches accuracy! The court also alludes to a clipping in the Kansas City Star of December 5, 1967, which

> "* * * reports that the new boundary lines for the Kansas City School Board divided the population within that school district 'into six subdistricts each with about 71,500 population. * * *'" (p. 27, Appendices to Jurisdictional Statement 279 F.Supp. at 972).

The court uses these two examples for the following thinly veiled admonishment of the 1967 Missouri General Assembly:

> "Local government public officials in this judicial district have consistently demonstrated that the one-man

one-vote constitutional principle can be applied without difficulty given the desire so to do." (p. 27, Appendices to Jurisdictional Statement, 279 F.Supp. at 972).

One can certainly not quarrel with the principle as thus expressed, but one could certainly question the "factual" examples upon which it is based, certainly an example which treats approximations and definity in the same breath and another example having its origin in a newspaper clipping with a phrase of such indefinite limits as "about 71,500". When precision is the standard by which the court has judged the Missouri Legislature, the court itself should abide by its own rigorous standard.

11. In a footnote (p. 3, Footnotes to Appendices to Jurisdictional Statement; 279 F.Supp. l.c. 958) to its finding that the legislature had used inaccurate population figures, the author of the majority opinion exchanged volleys with the author of the dissenting opinion so as to find that the legislature in all instances had received accurate population data from the urban areas of the state, namely, the City of St. Louis, St. Louis County and Jackson County. From this the Majority Judge went on to observe the following:

> "To state that the Legislature had but did not use accurate 1960 federal census figures is not to question the good faith of any member of the Missouri Legislature. That fact, it seems to us, forecloses that any public official other than the members of the Legislature can be charged with responsibility for the casual manner in which the important task of congressional apportionment was in fact approached by the 1967 General Assembly."

In a similar vein the Majority Judge later in the opinion concluded as follows:

> "• • • Indeed, the discharge of this delicate and quite

fundamental constitutional duty has been treated by three successive Missouri legislatures as a legislative step-child; apparently qualification for appointment to the committees which have unsuccessfully attempted to do the actual work seems to have been limited to those who insist upon believing that something less than full performance of the dual mandates of the Missouri and federal Constitutions is all that is required." (p. 16, Appendices to Jurisdictional Statement; 279 F.Supp. l.c. 966).

To the extent that either of these two foregoing observations of the Majority of the court represent findings that the 1967 Missouri Legislature gave only incidental heed to the problem of reapportionment, the court has superimposed its own predilections upon evidence not presented in this case. These findings represent nearly total blindness to the testimony of the five spokesmen of the legislature, members of both political parties and men who were not politically or philosophically aligned to one another. Their collective testimony clearly and unmistakably evinces that they and their colleagues approached the task of reapportionment with dedication, perserverance and unquestionable attention throughout the six-month biennial session. The court's regard for the legislative process and specifically its attitude toward the Missouri Legislatures of past years and of present is succinctly revealed in a footnote that concludes with the following statement (p. 3, Footnotes to Appendices to Jurisdictional Statement; 279 F.Supp. 959).

"* * * In reflective moments, we have pondered what response would be given by members of the General Assembly to an effort that would attempt to justify a refusal to enforce a law enacted by that legislative body on the ground that it was politically inexpedient, as a

matter of practical politics, for the offender to have complied with such a law."

This court has thereby confessed its allegiance to the startling principle that legislators are now to be likened to persons hauled in to the courts of justice to answer charges made against them of violation of one or more laws, and, in its import, plainly refuses the traditional respect normally accorded lawmakers and their products. It is though the court alone has access to the Constitution with no possibility that legislative bodies can perceive and implement its meaning.

12. In summation of that portion of its findings labeled Appendix A the court once again, without justification, reprimanded the 1967 Missouri General Assembly for their failure to draw compact and contiguous districts, and makes reference in this regard to an old Missouri Supreme Court opinion on the subject of gerrymander. (State ex rel. **Barrett v. Hitchcock,** 146 S.W. 40 (Mo. 1912) pp. 31-32 Appendices to Jurisdictional Statement; 279 F.Supp. at 975). In a footnote the court quotes from this earlier Supreme Court of Missouri case and cites it for the proposition that state courts fifty years ago easily understood state constitutional requirements on legislative apportionment to be mandatory rather than directory. The **Barrett** case was a judicial examination of the apportionment of the Missouri Senatorial districts in 1910, when the state's population was 3,293,334, and each of the 34 Senatorial Districts ideally consisted of 96,862 persons. The particular districting plan under review had allotted only six Senatorial Districts to the City of St. Louis which had a population of 687,029 (An average variation of 18.2% from the ideal) whereas, the allotment of seven Senatorial districts to the city would have left only 8,995 in excess of perfect apportionment. Thus, the case represents solid precedent for principles alone and is not one

having any close factual similarity to the 1967 Missouri Congressional Districting Act.

Appellants consider especially significant though in this earlier Missouri Supreme Court opinion language (from the Michigan case, **Giddings v. Blacker**, 52 N.W. 944) which the lower court in this case carefully edited out of its quotation from that earlier opinion. Appellants therefore wish to quote the earlier opinion, as did the lower court in this case, but with the inclusion of omitted parts that are herewith underlined (p. 10, Footnotes to Appendices of Jurisdictional Statement).

> "* * * the time for plain speaking has arrived in relation to the outrageous practice of gerrymandering, which has become so common, and has so long been indulged in without rebuke, that it threatens, **not only the peace of the people**, but the permanency of our free institutions. **The courts alone, in this respect, can save the rights of the people, and give to them a fair kind of equality of representation.** * * *
>
> * * * There is not an intelligent schoolboy but knows what is the motive of these legislative apportionments; and it is idle for the courts to excuse the action upon other grounds, or to keep silent as to the real reason * * *", Emphasis added (146 S.W. at 57).

Judicial intolerance of a sister branch of government could hardly be more strongly expressed! The appelants are struck by the apparent kinship in philosophy between the judicial author of earlier times and the judicial author of the opinion now on appeal, a philosophy that virtually denies the capability of legislative bodies to establish legislative boundaries in a constitutional fashion.

The Court refers to the **Barrett** case in another section of the Findings of Fact as illustrating ". . . why a Missouri

Court fifty years ago had no difficulty with the 'as nearly equal as may be' language in the 1875 Missouri Constitution." (p. 51, Appendices to Jurisdictional Statement; 279 F.Supp. at 986). On this same pilgrimage into the past, the Court plumbs two Federal cases to show that ". . . Federal courts had no difficulty whatsoever in either understanding that language ["as nearly as practicable"] or in applying the standard it established to the facts presented by particular cases." (p. 56, Appendices to Jurisdictional Statement; 279 F.Supp. at 989). **Broom v. Wood**, 1 F.Supp. 134 (SD Miss. 1932), one of the two cases, involved Mississippi's then seven congressional districts, each of which would ideally have contained 287,117 inhabitants by virtue of a total state population of 2,009,821. The most populated district in the judicially invalidated act contained 414,000 [+44% above the ideal] persons and the least populated had 184,000 [−36% below the ideal]. The other case, **Hume v. Mahan**, 1 F.Supp. 142 (ED Ky. 1932) was a review of Kentucky's 1932 congressional District Act. The 1930 census of Kentucky was 2,614,589 and nine congressmen were apportioned to the state. Although each district should have ideally contained 290,510, the one judge Federal Court approved Jefferson County (Louisville) with a population of 355,350 as one congressional district out of respect for the preservation of county lines. Then, with 2,259,239 of the state's population remaining, and the eight districts therein ideally containing 282,405 persons, the Court invalidated the act because it had a most populated district of 352,869 [plus 24%] and a least populated district of 238,000 [minus 13%]. Because of the marked factual dissimilarity of all these earlier cases, appellants believe the lower court's point is lost. Missouri's 1967 Congressional Districting Act is hardly the black and white situation of those cases but more likens to the dilemma confronting a still earlier state court.

"'While it is impossible, in the nature of the case, to accurately describe and closely limit the amount of deviation from an equal representation that the practical working of the Constitution may in this respect permit, it is, on the other hand, sometimes quite possible to say of a particular example that it does or does not violate the constitutional mandate. We have no trouble whatever in detecting the difference between noon and midnight; but the exact line of separation between the dusk of the evening and the darkness of advancing night is not so easily drawn.' **Baird v. Kings County (People ex rel. Baird v. Broom)**, (1893) 138 N.Y. 95, 20 L.R.A. 81, 33 N.E. 827.

The court devotes considerable attention to a semantic comparison of the words "practicable" and "practical" to reach the conclusion, as appellants view it, that the equality of population standard contained in Article I, Section 2, of the United States Constitution is the antithesis of practical politics, and that the appearance of any political expediency or legislative compromise accompanied by some deviation from absolute mathematical equality renders a reapportionment act invalid (p. 6, Footnotes to Appendices to Jurisdictional Statement; 279 F.Supp. l.c. 962). In effect, the court has defined practicable to mean theoretical and with this the appellants take issue. Whoever may have coined or initiated the phrase "as nearly equal as practicable" surely could not have thereby intended exclusion of all practicality.

"* * * PRACTICABLE, from **practice (v. To exercise)**, signifies to be able to put in practice:

* * *

"The **practicable** is that which may or can be **practised**; the PRACTICAL is that which is intended for **practice**: the former, therefore, applies to that which men devise

to carry into **practice**; the latter to that which they have to **practise**: projectors ought to consider what is **practicable**; divines and moralists have to consider what is **practical**. The **practicable** is opposed to the **impracticable**; the **practical** to the theoretical or speculative." Crabb's English Synonymes, Harper & Brothers, New York, 1889, p. 674.

"**2 Practicable, practical** are not synonyms in good current use, but they are sometimes confused when they imply a capacity for being used or turned to account. **Practicable** (see also POSSIBLE, 1) applies chiefly to things which have not been worked out (as a plan, project, scheme, design) or which have been recently devised, invented, constructed, or the like (such as a new machine, a new form of entertainment, a new implement), and about which one of the following questions arises: is it capable of being developed or worked out, or is it likely to prove successful in operation or use; thus, many plans for the eradication of poverty are dismissed as "not **practicable**" (or "**impracticable**"); the possibility of wireless telegraphy was questioned until Marconi demonstrated its **practicability**; no **practicable** winter automobile that operates on runners rather than on wheels has yet been devised. **Practical** applies not only to things (concrete and immaterial) but also, as **practicable** never does, to persons. The term in all of its senses stresses an opposition to that which is **theoretical, speculative, ideal, unrealistic, imaginative**, or the like, and implies a relation to the actual life of man, his daily needs, or the conditions which must be met. When the term also implies a capacity for use, it emphasizes actual usefulness rather than highly probable or merely discovered usableness; thus, the automobile when first invented was not regarded as **practicable** by many persons but as a result of numerous improvements in the course

of time it is now regarded as a most **practical** vehicle for pleasure, business, transportation, and the like; 'Without his [Faraday's] researches in magnetic electricity we might have missed . . . those most **practical** machines of our modern life, the dynamo and the telephone' (**H. Ellis**). Hence, **practical** may apply to anything that is such in kind, character, amount, effect, or the like, that it is definitely useful or serviceable in actual life; as, very few students of French gain a **practical** knowledge of it unless they spend at least a year in France; 'In everything he undertook he demanded a utilitarian purpose and a **practical** result' (**Buchan**); 'These writers cannot confirm any one in the faith; they can merely have the **practical** value of removing prejudices from the minds of those who have not the faith but who might possibly come to it' (**T. S. Eliot**); 'With . . . the real, **practical** kindness of leaving some money for her board . . . they moved on' (**Deland**).

Webster's Dictionary of Synonyms, G. & C. Merriam Co., 1942, p. 639.

The lower court manifestly has accorded to the word practicable a meaning which is impossible of execution by legislative bodies. Practicable in the court's sense could only be achieved by computers or academic theoreticians, not bound to the desires or preferences of any group or factions. Legislative bodies, as representatives, are by definition obligated to diverse and often conflicting interests. Practicality is their way of life, and the constitutional standard of practicability must, for them, comprehend some degree of practicality.

The lower court obviously is not in harmony with **Exon v. Tiemann**, 279 F.Supp. 612 which rejected similar views by the plaintiff as follows:

"Plaintiff in approaching the problem argues that the word 'practicable' should be interpreted to mean 'pos-

sible' when applied to redistricting plans. He argues that the plan which the Legislature considered most practicable would have to be the most precise plan mathematically possible and that a plan such as L.B. 1, which is not the most precise plan mathematically possible, should be held unconstitutional unless the defendants justified the deviation."

14. The lower court makes a great ado over the inaccurate population calculations of districts in the 1967 Act by the Missouri General Assembly. These inaccurate calculations are erroneously referred to as the failure to use correct census data. The court also appears to indicate that the populations as intended by the legislature of the proposed districts which would have resulted in a ratio of 1.04 to 1 might have met the population requirements of the Constitution, whereas the districts as accurately calculated with a ratio of 1.06 to 1 are clearly in violation of the population requirements of the Constitution.

Admittedly the inaccurate population calculations were made. However, far too much significance is attached to these minor miscalculations by the court. Maximum populations of 2% from an ideal district became 3% from an ideal district. These calculations are based upon census figures which were over seven years old.

The following statistics are from U.S. Bureau Census, County and City, Date of Book 1967 (A statistical abstract supplement) U.S. Government printing offices, Washington, D.C., 1967.

Item 8 of Table 2 in the work cited indicated the natural increase in population between 1960 and 1965. The figure for the state as a whole (Page 202) is 5.1%. The changes in population for different counties during this period vary from a decrease of 1.7% (Daviess County) to an increase of 13.2%

for St. Charles County. Some other variances are as follows:

| | |
|---|---|
| Grundy Co. 1.4% decrease | Hockory Co. 1.2% decrease |
| Mercer Co. 1.4% decrease | Linn Co. 1.5% decrease |
| Audrain Co. 5.1% increase | Boone Co. 815 increase |
| Cass Co. 5.9% increase | Clay Co. 8.7% increase |
| Cole Co. 5.6% increase | Dunklin 5.1% increase |
| Franklin Co. 6.9% increase | Jackson Co. 6.5% increase |
| Mississippi Co. 6.9% increase | New Madrid 7.0% increase |
| Osage Co. 5.6% increase | Pemiscot 7.3% increase |
| Perry Co. 5.6% increase | Phelps 6.1% increase |
| Platte Co. 6.9% increase | Jefferson Co. 9.2% increase |
| St. Louis Co. 7.7% increase | Ste. Genevieve 6.7% increase |
| Scott Co. 7.3% increase | Washington 6.0% increase |

Therefore, it is demonstrated that the 1960 census population figures, as of 1965, could be as far off as 15%. To divide an object within 3% accuracy, when the object itself cannot be measured within 15% accuracy, is certainly within permissible tolerances. In its concern over a defectively sighted weapon, the court has put a telescopic sight on a shotgun.

Reason dictates that a de minimis standard or a judicial tolerance of minor variations, must apply to congressional reapportionment for the reason that the subject matter, namely population, is never capable of precise measurement. The subject matter is always in a state of change. Of necessity, we are dealing with approximate measures and numbers in motion. Population, like a river, continually flows. It is sometimes high, sometimes low, but always changing. A perfect apportionment would be to accurately measure the population on election day and divide the state into absolutely equal districts on that date. Such a perfect apportionment is, of course, impossible of practical attainment. Any apportionment short of the perfect apportionment will have mathematical differences.

It is recognized that apportionment need not be done more frequently than decennially. Within a period of ten

years, there will be considerable change in the population and the apportionment will in all likelihood have considerable mathematical inequalities at the end of the period. Apportioning without recognition of the fact that population continually changes is like buying shoes for a growing boy that fit like a glove. They would be outgrown immediately, and certainly we cannot expect them to be worn for ten years. In this particular case, it is eight years since the state's foot was last measured. It is self-evident that the 1960 measurement is no longer accurate.

To require perfect apportionment at the beginning of the decennium is unrealistic. To require such eight years later is doubly so. The lower court's rejection of the 1967 Missouri Act because of a maximum population variation of 25,000, or 6 per cent, is a virtual quest for perfect apportionment in a world that does not exist.

## CONCLUSION.

This appeal seeks a reversal of the judgment and opinion of the lower court which invalidated the 1967 Missouri Congressional Redistricting Act. The grounds for the reversal of this judgment have been substantiated in this argument by reason and by applicable authorities. Bases for reversal of the lower court are as follows:

1. The 1967 Missouri Congressional Redistricting Act created districts which meet the population requirements of Article I, Section 2, Constitution of the United States. The variations in the population of the various districts are minor and do not infringe upon the right to vote inherent in the citizens of the various districts. Furthermore, the variations in the population of the districts are justified upon considerations by the Missouri General Assembly to create districts which were compact and contiguous, which maintain the integrity of county lines outside the major metropolitan areas of St. Louis and Kansas City, which gave recognition to historical and traditional factors and which gave recognition to other legitimate considerations relevant to the particular districts created. A consideration of the constitutional validity of the population makeup of these districts is supported by a further recognition that the census data with which the legislature was working was over seven years old and that such data will be made current in 1971.

2. The decision of the lower court should be reversed because it is based upon an erroneous principle that congressional districts do not meet the population requirements of the United States Constituion if better plans in terms of population equality have been presented to the legislature or to the court. Not only is this principle erroneous but also the court erroneously found that such better plans were in fact presented to the legislature.

3. The decision of the lower court erroneously rejected the principle that **de minimis** or minor population variations in congressional districts are constitutionally permissible **per se.**

4. The court erroneously rejected as a legitimate consideration in congressional reapportionment legislative interplay and reasonable legislative compromise in the process of congressional reapportionment enactments.

5. The findings of fact and the conclusions of the court are based upon many inaccuracies, distortions and irrelevancies reached by the court in its opinion and as detailed by appellants in the fifth argument of this brief. Thus, the opinion is unsound in fact and in law.

Appellants respectfully submit that the court should enter its judgment reversing the judgment of the lower court and remanding this cause with instructions to the lower court to enter its judgment finding that the 1967 Missouri Congressional Redistricting Act meets the constitutional requirements of Article I, Section 2, Constitution of the United States.

Respectfully submitted,

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